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R E P O R T
OF THE
AUCHTERARDER CASE,

THE EARL OF KINNOULL, AND THE REV. R. YOUNG,

AGAINST

THE PRESBYTERY OF AUCHTERARDER.

BY CHARLES ROBERTSON, Esq.,
ADVOCATE,

ONE OF THE COLLECTORS OF DECISIONS, BY APPOINTMENT OF THE
FACULTY OF ADVOCATES.

VOL. I.

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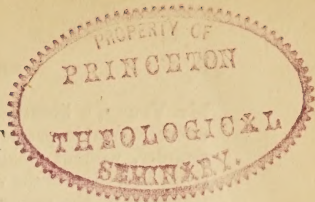
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REPORT

OF THE CASE

THE EARL OF KINNOULL &c., against THE PRESBYTERY
OF AUCHTERARDER, &c.

The Judges of the First Division of the Court of Session, having pronounced an order, that this cause should be argued before the whole Court, the pleadings were opened on the 21st of November 1837, before the following Judges :

First Division.

LORD PRESIDENT HOPE.
LORD GILLIES.
LORD MACKENZIE.
LORD COREHOUSE.

Lords Ordinary.

LORD FULLERTON.
LORD COCKBURN.

Second Division.

LORD JUSTICE-CLERK BOYLE.
LORD GLENLEE.
LORD MEADOWBANK.
LORD MEDWYN.

Lords-Ordinary.

LORD MONCREIFF.
LORD JEFFREY.

Lord Ordinary on the Bills, LORD CUNINGHAME.

Counsel for the Pursuers.

DEAN OF FACULTY HOPE.
ROBERT WHIGHAM, ESQ.
Agent, Mr. A. STORIE, W.S.

Counsel for the Defenders.

SOLICITOR-GENERAL RUTHERFURD.
ROBERT BELL, ESQ.
ALEXANDER DUNLOP, ESQ.
Agents, MESSRS BELLS and RUTHERFORD, W.S.

Mr. WHIGHAM.—I attend your Lordships on behalf of the pursuers, the Earl of Kinnoull, who is patron of the parish of Auchterarder, and the Rev. Robert Young, the presentee to that parish. The defenders in the action are, the Presbytery of Auchterarder, the Heritors of the Parish of Auchterarder, and the Trustees of the Minister's Widow's Fund. To protect themselves, the heritors have raised a process of multiplepinding, which is now in dependence before the Lord Ordinary, in which they express their willingness to pay the stipend to whomsoever shall be found to have right to it. The trustees of the Ministers' Widows' Fund, have been called as defenders, in order that they and the Presbytery, and all others, may be ordained not to molest the pursuers in the enjoyment of the stipend and other emoluments of the benefice.

The main question, however, arises betwixt the pursuers and the presbytery of Auchterarder, and it is, Whether—by rejecting

Mr. Young, a licentiate of the Church of Scotland, holding an unexceptionable presentation to the church and parish of Auchterarder, without making trial of his qualifications, and exclusively in respect of the veto of a majority of male heads of families, members of the vacant congregation, being in full communion with the church—the presbytery have violated the patrimonial rights of the pursuers or either of them? There are some subordinate questions raised in the record, on which it may be necessary likewise to address some observations.

I have in the outset to request the attention of your Lordships to the facts of the case.

In May 1834, the General Assembly of the Church of Scotland passed, what is designated an “Overture and Interim Act on Calls,” and which is expressed in the following terms:

“*Edinburgh, May 31, 1834.*—The General Assembly declare, “That it is a fundamental law of this church, that no pastor shall “be intruded on any congregation contrary to the will of the people; and, in order that this principle may be carried into full effect, the General Assembly, with the consent of a majority of the “presbyteries of this Church, do declare, enact, and ordain, that “it shall be an instruction to presbyteries, that if, at the moderating in a call to a vacant pastoral charge, the major part of the “male heads of families, members of the vacant congregation, and “in full communion with the church, shall disapprove of the person in whose favour the call is proposed to be moderated in, such “disapproval shall be deemed sufficient ground for the presbytery “rejecting such person, and that he shall be rejected accordingly, “and due notice thereof forthwith given to all concerned; but that “if the major part of the said heads of families shall not disapprove “of such person to be their pastor, the presbytery shall proceed “with the settlement according to the rules of the church: And “farther declare, that no person shall be held to be entitled to “disapprove as aforesaid, who shall refuse, if required, solemnly “to declare, in presence of the presbytery, that he is actuated by “no factious or malicious motive, but solely by a conscientious “regard to the spiritual interests of himself or the congregation.”

In order to carry the fundamental law into effect, the Assembly, at a future diet, passed certain regulations and forms of procedure, to which it is also necessary to draw the attention of the court. The first directs, “that when the Presbytery shall have “*so far sustained a presentation* to a parish, as to be prepared “to appoint a day for moderating in a call to the person presented,” they shall appoint one of their number to preach in the vacant church, and intimate, that the presbytery will, on a certain day, proceed “to moderate in a call to such person to be “minister of the said parish *in the usual way.*”

“ 2. That, on the day appointed for moderating in the call, the presbytery shall, in the first instance, proceed in the same manner in which they are in use at present to proceed.

“ 3. That if no special objections, and no dissents, by a major part of the male-heads of families, being members of the congregation, and in full communion with the church, according to a list or roll to be made up and regulated in manner herein-after directed, shall be given in, the presbytery shall proceed to the trials and settlement of the presentee, according to the rules of the church.

“ 4. That it shall be competent to any one or more of the heads of families in the parish, in full communion with the church, by themselves, or by an agent duly authorized, to state any special objections to the settlement of the person presented, of whatever nature such objections may be; and that, if the objections appear to be deserving of deliberate consideration or investigation, the presbytery shall delay the further proceedings in the settlement till another meeting, to be then appointed, and give notice to all parties concerned, then to attend, that they may be heard.

“ 5. That, if the special objections so stated, affect the moral character or the doctrine of the presentee, so that, if they were established, he would be deprived of his license, or of his situation in the church, the objectors shall proceed by libel, and the presbytery shall take the steps usual in such cases.

“ 6. That if the special objections relate to the insufficiency or unfitness of the presentee for the particular charge to which he has been appointed, the objectors shall not be required to become libellers, but shall simply deliver, in writing, their specific grounds for objecting to the settlement, and shall have full liberty to substantiate the same; upon all which the presentee shall have an opportunity to be fully heard, and shall have all competent means of defence: That the presbytery shall then consider these special objections, and, if it shall appear that they are not sufficient, or not well founded, they shall proceed to the settlement of the presentee, according to the rules of the church: but if the presbytery shall be satisfied that the objector or objectors have established that the presentee is not fitted usefully and sufficiently to discharge the pastoral duties in that parish, then they shall find that he is not qualified, and shall intimate the same to the patron, that he may forthwith present another person—it being always in the power of the different parties to appeal from the sentence pronounced by the presbytery, if they shall see cause.

“ 7. That if it shall happen that, at the meeting for moderating in the call, *dissents* are tendered by any of the male heads

“ of families, being members of the congregation, and in full
“ communion with the church, their names standing on the roll
“ above referred to, *without the assignment of any special objec-*
“ *tions*, such dissents shall either be personally delivered in writ-
“ ing by the person dissenting, or taken down from his oral
“ statement by the moderator or clerk of the presbytery.

“ 8. That if the dissents so lodged do not amount in number
“ to the major part of the persons standing on the roll, and if there
“ be no special objections remaining to be considered, the Presby-
“ tery shall proceed to the trials and settlement, according to
“ the rules of the Church.

“ 9. That if it shall appear that dissents have been lodged by
“ an apparent majority of the persons on the said roll, the Pres-
“ bytery shall adjourn the proceedings to another meeting, to
“ be held not less than ten days, nor more than fourteen days
“ thereafter.

“ 10. That if the Presbytery deem it expedient, and the per-
“ son presented be willing, or if he shall desire so to do, the
“ presbytery shall appoint him to preach to the congregation in
“ the interval.

“ 11. That it shall not be competent to receive any dissents
“ without cause assigned, except such as shall be duly given in
“ at the meeting for moderating in the call, as above provided ;
“ but it shall be competent to any person, who may have lodged
“ a dissent at that meeting, to withdraw such dissent at any time
“ before the presbytery shall have given judgment on the effect
“ of the dissents.

“ 12. That, in case the presbytery shall, at the second meet-
“ ing appointed, find that the major part of the persons entitled
“ to dissent do not adhere to their dissents, or that there is not
“ truly a majority of such persons on the roll dissenting, they
“ shall sustain the call, and proceed to the trials and settlement.

“ 13. That, in case the presbytery shall at that meeting find
“ that there is a majority of the persons on the roll still dissent-
“ ing, it shall be competent to the patron or the presentee, or to
“ any member of the presbytery, to require all or any of the per-
“ sons so dissenting to appear before the presbytery, or a com-
“ mittee of their number, at a meeting to be appointed, to take
“ place within ten days at furthest, at some place within the pa-
“ rish, and there and then to declare in terms of the resolution
“ of the General Assembly ; and if any such person shall fail to
“ appear, after notice shall have been duly given to him, or shall
“ refuse to declare in the terms required, the name of such person
“ shall be struck off the list of persons dissenting, and the presby-
“ tery shall determine whether there is still a major part dissent-
“ ing or not, and proceed accordingly.

“ 14. *That, if the presbytery shall find that there is at last a major part of persons on the roll dissenting, they shall reject the person presented, so far as regards the particular presentation, and the occasion of that vacancy in the parish; and shall forthwith direct notice of this their determination to be given to the patron, the presentee, and the elders of the parish.*

“ 15. *That if the patron shall give a presentation to another person within the time limited by law, the proceedings shall again take place in the same manner as above laid down; and so on in regard to successive presentations within the time.*

“ 16. *That if no presentation shall be given within the limited time, to a person from whose settlement a majority on the roll do not dissent, the presbytery shall then present jure devoluto.*

“ 17. *That cases of presentation by the presbytery jure devoluto, shall not fall under the operation of the regulations in this and the relative act of Assembly, but shall be proceeded in according to the general laws of the Church applicable to such cases.* But every person who shall have been previously rejected, shall be considered as disqualified to be presented to that parish on the occasion of that vacancy.

“ 22. *That the presbyteries of the Church shall use their utmost endeavours to bring about harmony and unanimity in congregations, and be at pains to avoid every thing which may excite or encourage unreasonable exceptions in people against a worthy person that may be proposed to be their minister.*” The regulations which I have not read do not affect this question.

“ The General Assembly agree to transmit the above Over-
ture and Regulations to presbyteries for their opinion;
and, in the meantime, without a vote, they convert the
same into an interim-act.

“ The General Assembly further declare, that cases in which
the vacancies have taken place before the rising of the
present Assembly, shall not fall under the operation of
the regulations in this and the relative acts of Assembly,
but shall be proceeded in *according to the general laws
of the Church.*”

Thus your Lordships see, that provision is made—1st, for objections, of whatever nature, being taken by the male heads of families, or any of them, to a presentee. But the objections are to be differently dealt with, according as they affect the moral character, or the doctrine of the presentee, or relate merely to his insufficiency or unfitness for the particular charge. 2d, Though no special objections can be stated to the moral character, doctrine, or fitness of the presentee for the particular charge, it is, never-

theless declared, if a majority of male heads of families, merely *dissent*, that the presbytery shall, in respect of such dissent, *reject* the presentee, “so far as regards the *particular presentation*, and “the occasion of that vacancy in the parish.” 3d, If the patron do not present another person within the time required by law, from whose settlement the major part of the heads of families do *not* dissent, then the presbytery shall *present, jure devoluto*. But, *lastly*, when the way has been opened for the exercise of the right of presentation by the presbytery, the *fundamental law of the Church*, “that no pastor shall be intruded on any congregation “contrary to the will of the people,” is put aside. Presentations by presbyteries are not to fall under its operation,—the regulations are not to apply to them,—they are to be proceeded “in according to the *general laws of the Church applicable to “such cases.*” To ordinary understandings the import of the enactment is, that the law, being a *fundamental law*, in *no case* should a pastor be intruded on a congregation contrary to the will of the people. Nevertheless, it is not a fundamental principle in the case of presentations by presbyteries *jure devoluto*. Of this most anomalous and inconsistent piece of legislation, your Lordships will hear more in the course of the present discussion.

The church and parish of Auchterarder became vacant *on the 31st of August 1834*, and on the 14th of September Lord Kinnoull issued a presentation in favour of Mr. Young. To the nature and terms of that deed I shall have particularly to refer hereafter. On the 14th of October 1834 Lord Kinnoull’s agent laid the presentation in favour of Mr. Young upon the table of the presbytery, together with a certificate that his Lordship had qualified himself to exercise the right by taking the oaths to Government; a letter by Mr. Young accepting of the presentation; a certificate of his having qualified himself to accept the presentation, by taking the oaths to Government; a certificate signed by the ministers of Dundee, that Mr. Young was a licentiate of that presbytery, with an engagement to produce an extract of his license as soon as a meeting of the presbytery of Dundee could be held; and, lastly, the usual “parochial certificate,” as it is termed, by one of the ministers of Dundee, certifying “that he “had been acquainted with Mr. Young for many years; that he “has gone through a regular course of education, and was highly “applauded for his progress in the grammar school, academy, “and university; that his appearance before the presbytery was “highly respectable; that he preached in the churches of Dundee with approbation; that he assisted my colleague, Dr. “Peters, for some time, who by indisposition is unable to testify “to merits which he often applauded; that I believe Mr. Young “is a Christian throughout in principles, sentiments, and manners; that his opinions are evangelical; that he is warmly

“ attached to the interests of religion, and that he will exert all his power and influence in promoting the cause which he so highly admires.” These several documents having been read, were appointed by the presbytery of Auchterarder to lie on their table until their next meeting.

Another meeting of presbytery was held on the 27th of October 1834, when Mr. Hope Moncrieff, on the part of the Earl of Kinnoull, produced an extract of Mr. Young's licence, with a testimonial in his favour by the presbytery of Dundee. The minutes of presbytery bear that these documents were read, and then they proceed as follows:—“ The presbytery taking into consideration that the late Rev. Charles Stewart, minister of Auchterarder, died on the 31st of August last, and that the twenty-third regulation of the interim-act of the late General Assembly anent calls intimates, that all cases in which the vacancies have taken place after the rising of said Assembly, shall fall under the operation of the regulations and relative act of Assembly anent calls; finds, therefore, that they must proceed to fill up the vacancy of Auchterarder according to said act and relative regulations. The presbytery also considering that all the documents usually given in in cases of this kind have already been laid on the table, along with the presentation by the Earl of Kinnoull to Mr. Robert Young, preacher of the gospel, to be minister of the church and parish of Auchterarder, did, in pursuance of the first regulation of the act of Assembly anent calls, IN SO FAR SUSTAIN THE PRESENTATION as to find themselves prepared to appoint a day for moderating in a call to Mr. Young.” The presbytery then appointed one of their number to preach in the church of Auchterarder on the next Sabbath, and to intimate that Mr. Young would preach on Sunday the 16th, and also on Sunday the 23d of November; and farther, that the presbytery “ will meet in the church of Auchterarder on the first Tuesday of December next, (1834), being the second Tuesday of that month, to moderate in a call IN THE USUAL WAY to Mr. Young, to be minister of that parish, the moderator to preach and preside. In all which sentence of the presbytery Mr. Moncrieff acquiesced, and took instruments in the clerk's hands. From which sentence of the presbytery, in so far as it at all sustained the presentation, Messrs. Mackenzie and Walker dissented, on the ground that by so doing, the presbytery did seem to homologate and approve of patronage.”

Thus your Lordships see it is instructed by the minutes of the procedure in the church court, that the pursuers, as patron and presentee, complied with every requisite both of the civil and ecclesiastical laws. The right of the patron to present to the va-

cant church and parish, and the right and qualifications of Mr. Young, as a licentiate of the Church of Scotland, to accept and hold the presentation in his favour, are distinctly admitted by the presbytery, by whom the presentation was in consequence so far sustained as to warrant them in appointing a day for moderating in a call "in the usual way." The patron alone was represented at these meetings of presbytery; and so far as the proceedings went, neither he nor the absent presentee had apparently any interest to object to them. It was acknowledged that every thing which by law could be required of them had been done; and, the presentation being sustained, there were, by that deed and the relative act of the presbytery, vested in the patron and presentee, patrimonial rights and privileges which they could assert and maintain against the presbytery and all others. For, having sustained the presentation, and acknowledged the due performance of every legal requisite by the patron and presentee, the presbytery were bound to proceed with the trials of the presentee, and if they found him, by their sentence, qualified for the office of the ministry in the church and parish of Auchterarder, to induct him accordingly; or otherwise, having made trial of his qualifications, to find that he *was not qualified for that office*.

On the 2d of December 1834, the Presbytery again met at Auchterarder, for the purpose of moderating in a call to Mr. Young; and, after sermon by the moderator, the minutes bear that "there was produced and read a call to Mr. Robert Young "to be minister of the church and parish of Auchterarder; and "an opportunity was given to the heritors, elders, heads of families, and other parishioners, to sign it. Mr. Lorimer then signed "for the Earl of Kinnoull, as patron, being his factor; and the "call was further signed by Michael Tod and Peter Clerk, "heads of families. The presbytery then proceeded, in terms of "the third regulation of the interim-act of last Assembly anent "calls, to give an opportunity to the male heads of families, being members of the congregation, and in full communion with "the church, whose names stand in the roll which has been inspected by the Presbytery, *to give in special objections or dissents*, WHEN NO SPECIAL OBJECTIONS WERE GIVEN IN. A mandate "from Mr. Robert Young, presentee to the parish of Auchterarder, to Archibald Reid, Esq. writer in Perth, was given in, authorising him to appear as his agent in this case; which mandate having been read, was sustained. Compeared William "Thomson, session-clerk of Auchterarder, and being asked "produced a roll of male heads of families in the parish "of Auchterarder, in terms of the regulations of the act of "the last assembly anent calls. At this stage, Mr. Reid was "heard, and *objected to the presbytery either receiving or*

“ *acting upon said roll*, inasmuch as the same was not made
 “ up either within the time, or in the manner prescribed by
 “ act of Assembly. The presbytery feel themselves obliged to
 “ repell said objection, they having already sanctioned the roll
 “ as given in by the kirk session, and as containing a correct list
 “ of male heads of families, in communion with the church, with-
 “ in the two months of the rising of the Assembly, and after the
 “ last dispensation of the Lord’s Supper in the parish. *Against*
 “ *which sentence Mr. Reid protested, and appealed* to the next
 “ meeting of the Synod of Perth and Stirling, for reasons to be
 “ given in in due time, took instruments in the clerk’s hands,
 “ and craved extracts, not only of the proceedings of this day,
 “ but of all former proceedings of the Presbytery, in reference to
 “ the vacancy and settlement of this parish, &c. and also certified
 “ copies of the said roll, and of all other documents produced to
 “ the presbytery, either on this day or at former meetings, in re-
 “ ference to the case, in so far as the same are not engrossed in
 “ the minutes.

“ The presbytery agree to give the proper extracts and papers
 “ relating to their procedure in this case to Mr. Reid; but enjoin
 “ their clerk to give none till their next meeting, the minutes of
 “ this days proceedings not being yet extended. It was then
 “ *moved and seconded* that the presbytery do now proceed in this
 “ case, in terms of the regulations of the interim-act of last As-
 “ sembly anent calls. It was also *moved and seconded* that an
 “ appeal having been taken against the decision of the presbytery
 “ over-ruling the objection taken respecting the roll, the presby-
 “ tery sist procedure till that appeal be disposed of. After some
 “ discussion, the mover and seconder of the second motion with
 “ the leave of the Court, withdrew it upon the understanding
 “ that they are not to be held as approving of the first motion.
 “ The presbytery then, in accordance with the first motion, agreed
 “ to proceed in this case in terms of the regulations of the act of
 “ Assembly; *against which sentence Mr. Reid protested and ap-
 “ pealed* to the next meeting of the Synod of Perth and Stir-
 “ ling,” &c.

Thus it appears from the minutes of Presbytery, that no
special objections or objections of any description were stated
 to the settlement of Mr. Young; and farther, that “ In confor-
 mity with the regulations of the act of Assembly, the presbytery
 “ then proceeded to afford an opportunity to the *male heads* of
 “ families whose names stand upon the roll, to give in *dissents*
 “ from the call and settlement of Mr. Robert Young as minister
 “ of the parish. The following heads of families whose names
 “ stand on the roll, did then appear before the presbytery, and
 “ did personally deliver *their dissent or disapproval of the*

“ PRESENTEE, and their names were taken down by the clerk of
“ presbytery.

“ The presbytery found, in terms of the Ninth regulation,
“ that *dissents* have been lodged by an apparent majority of the
“ persons on the roll inspected by the presbytery. The presby-
“ tery did then, in terms of the ninth regulation adjourn the pro-
“ ceedings in this case to the next meeting, to be held at
“ Auchterarder on Tuesday the 16th current. Against which
“ sentence of the presbytery, Mr. Reid, on the part of Mr.
“ Young, without prejudice to his former appeals, *protested* and
“ appealed to the ensuing meeting of the Synod of Perth and
“ Stirling, for reasons to be given in in due time, and there-
“ after took instruments and craved extracts.”

The adjourned meeting of the presbytery was held on the 16th
December 1834, when the presbytery proceeded, (after noticing
the reasons of appeal lodged on the part of the presentee,) “ in
“ terms of the twelfth regulation of the act of Assembly anent
“ calls, to ascertain whether or not the major part of the persons
“ on the roll of male heads of families in the parish of Auchter-
“ arder, inspected by the presbytery, entitled to dissent, who dis-
“ sented against the settlement of Mr. Young, do still adhere to
“ their dissents ; when, on the question being asked by their mo-
“ derator, none appeared to withdraw their dissents. The pres-
“ bytery at the same time found, in terms of said regulation, that
“ there is a majority of the persons on the roll still dissenting.

“ The presbytery then proceeded, in terms of the thirteenth
“ regulation, to give an opportunity to the patron, presentee, or
“ any member of presbytery, to require all, or any of the persons
“ dissenting, to appear before the presbytery, at a meeting to be
“ held in terms of said regulation, to declare, in terms of the reso-
“ lution of the General Assembly ; when, on the question being
“ asked by their moderator, no such requirement was made ; the
“ presbytery therefore adhere to the above finding, that a majo-
“ rity of the persons on the roll still dissent.

“ At this stage, Mr. M'Kenzie moved, that the presbytery *do*
“ *take into consideration* THE CALL to Mr. Young, presentee to
“ Auchterarder, and do find, that it being signed only by three
“ individuals, and of these only two members of the congregation ;
“ that said call is not a good or sufficient call ; and do declare,
“ that no settlement can take place thereupon ; which motion was
“ duly seconded. It was also moved and seconded, that the pres-
“ bytery refuse to act in terms of this motion, *as being incompete-*
“ *nt at this stage of the business.* The state of the vote was
“ fixed, first or second motion ; when the roll being called and
“ votes marked, it was carried, *second* motion. Which sentence
“ being intimated, Mr. M'Kenzie dissented, and protested for

“leave to complain to the ensuing meeting of the Synod of Perth and Stirling, for reasons to be given in in due time, took instruments in the clerk’s hands, and craved extracts, which were allowed.”

There was some farther discussion in regard to Mr. Young’s right to obtain full extracts of the proceedings of the presbytery in his case, but with that matter it is unnecessary to trouble the court. It will be observed that the presentee alone appeared, by his agent, as a party before the presbytery at their meeting held on the 2d of December, and that neither he nor the patron was present or represented at the meeting held on the 16th. The patron, indeed, was no party to any of the proceedings in the church courts after the meeting of presbytery on the 27th of October, when the presentation was sustained and a day appointed for “the moderation of a call to Mr. Young in the usual way.”

But against the proceedings of the presbytery, in so far as they repelled the objection taken on the part of the presentee to the presbytery’s receiving or acting on the roll of male heads of families, inasmuch as it had not been made up in the manner prescribed by the act of Assembly—and against the judgment of the presbytery resolving, notwithstanding the previous appeal, to proceed in the settlement of Mr. Young under the regulations of the General Assembly 1834—and against the judgment finding that dissents had been lodged by an apparent majority of persons standing on the roll, and therefore adjourning the proceedings to a future day—Mr. Young presented an appeal to the Synod of Perth and Stirling, which was dismissed on 21st April 1835.

From the sentence of the Synod, Mr. Young appealed to the General Assembly, and the records of that court bear, that on 30th May 1835, “it was moved and seconded, that the General Assembly *sustain* the appeal, reverse the sentence of the presbytery of Auchterarder, in so far as the Presbytery *refused to proceed with the trials and settlement of the appellant*, as presentee of the parish of Auchterarder, there being *no special objection against him*, or dissents by a majority of the male heads of families, according to a roll made up in the manner prescribed by the regulations enacted by the late General Assembly, and remit to the presbytery of Auchterarder to proceed with the trial and settlement of the appellant according to the rules of the church. *Another motion* was made and seconded, that the General Assembly find, that the Synod did wrong in finding that the appellant had not a right to any of the extracts referred to, and so far sustain the appeal, and reverse the sentence in that manner. But in respect that the presbytery, while they referred the question as to the right of the appellant to require such extracts, did authorise the clerk to give the extract which

“ was afterwards produced to the Synod, and that the said extract
 “ was upon the table of the Synod, and was read as the minutes
 “ bear, and that a copy of that extract has been laid before the
 “ Assembly by the appellant; find that the said sentence forms
 “ no bar to the Assembly now giving judgment on the merits of
 “ the cause; and on the merits *dismiss* the appeal, and find that
 “ the proceedings of the presbytery are not liable to any valid
 “ objections, and remit to the presbytery to proceed farther in the
 “ matter, in terms of the interim acts of last Assembly. The
 “ vote having been called for, it was agreed that the state of the
 “ vote should be first or second motion; and the roll being called
 “ and votes marked, it carried second motion by 131 to 95. Par-
 “ ties being called in, this judgment was intimated to them;
 “ whereupon Mr. Penney, for the objecting parishioners, took in-
 “ struments and craved extracts. Dr. Cook dissented in his own
 “ name, and in the name of all who may adhere to him, for rea-
 “ sons to be given in.”

A meeting of the presbytery of Auchterarder was held on the 7th of July 1835, when they resumed consideration of the case of Auchterarder. Mr. Archibald Reid appeared on the part of the pursuer Mr. Young, and an extract of the judgment of the General Assembly having been read, the minutes proceed in these terms:—“ After consideration, it was moved and seconded, that, in conformity with the sentence of the General Assembly 1835, and the interim act of the General Assembly 1834, *the presbytery do now REJECT Mr. Young, the presentee to Auchterarder, so far as regards the PARTICULAR PRESENTATION ON THEIR TABLE, and the occasion of this vacancy in the parish of Auchterarder, and do forthwith direct their clerk to give notice of this their determination to the patron, the presentee, and the elders of the parish of Auchterarder.* The presbytery agreed to this motion, and accordingly did, and hereby do, determine in terms thereof. Which sentence having been intimated, Mr. Clark tendered a dissent, bearing to be against this resolution of the presbytery, and hereby holding himself to be free from all the consequences that may result from the judgment of the presbytery. The presbytery refuse to receive this dissent, 1st, Because Mr. Clark declared, in the presence of the presbytery, that the decision to which the presbytery had come, was the only one to which, in the circumstances of the case, they ought to have come; and, 2d, Because neither he nor any other member of presbytery put any different motion on the record, as the presbytery conceive, ought to have been done, in order to entitle him to enter his dissent constitutionally. Mr. Maxton also tendered his dissent for the above and another reason, because the previous steps enjoined by the

“interim-act have not, in his opinion, been regularly observed by the presbytery. The presbytery refuse this dissent also, for the second reason mentioned above, and also because it is not competent for any member of presbytery to maintain irregularity on the part of the presbytery, in regard to any of the previous steps in the case which were not objected to at the time, and which have moreover been approved of and sanctioned by the General Assembly. The decision of the presbytery in this case was then intimated to the parties. Against which sentence Mr. Reid protested, &c.”

No appeal against this judgment was taken by Mr. Young to the superior ecclesiastical judicatories. The rejection of him, and of the particular presentation in his favour, by the presbytery, *before* taking him upon trials, he considered to be *ultra vires*, and in violation of the rights vested in him by the deed of presentation duly tendered by the Earl of Kinnoull to the presbytery, and by them sustained; and, therefore, that the competent and proper remedy for the illegal acts of the presbytery, was to institute the present action of declarator, with the subsidiary conclusions against the heritors of the parish of Auchterarder liable in payment of stipend, and the trustees of the fund established by statute for the widows and children of ministers of the church of Scotland.

I have now to request the attention of the Court to the terms of the summons, which sets out by stating the title of the pursuers as patron and presentee of the church and parish of Auchterarder. Then there are quoted the different statutes by which their patrimonial rights, and the obligations incumbent on the presbytery, are established. Next it states, that a vacancy had occurred in the parish, and that the Earl of Kinnoull had exercised his right as patron, by issuing a deed of presentation in favour of Mr. Young, which deed, according to the recognised usage both of the ecclesiastical and civil courts, first presents the individual to the presbytery, then disposes to him the constant and localised stipends, &c. and then *requires* the presbytery to take the presentee upon trials. The Earl of Kinnoull, as patron, does not, it will be observed, set forth merely a general or abstract right of patronage of the church and parish. The summons expressly states that his lordship *had exercised* what is admitted to be a *special patrimonial right*, and that he did so in proper form, thereby vesting in the presentee both “a status and certain patrimonial rights, the vindication of which he, as well as the patron, is entitled to follow forth, by calling upon the presbytery, in a proper and constitutional form, *to discharge the duty* which by law is imposed upon them as a church court. The summons farther sets

forth, that the deed of presentation was so far sustained by the presbytery as that they appointed a day for moderating in a call to Mr. Young in the usual manner, but that, instead of proceeding in the usual manner, they, by their sentence of the 7th July 1835, rejected the presentation and presentee: That their deliverances of 2d December and 7th July “were *ultra vires* illegal and “unwarrantable, in so far as that, though by the laws and statutes “before libelled, the presbytery were bound and astricted to make “trial of the qualifications of the pursuer, Robert Young, as presentee to the church and parish of Auchterarder, and were not “entitled to delegate to, or devolve that duty on third parties, or “to denude and abandon their right and duty as a church court, “to judge of and decide upon the qualifications and fitness of the “presentee for the pastoral office and charge; and, after examination by said presbytery, if the pursuer, the said Robert “Young, as presentee foresaid, was found to be duly qualified, “the said presbytery were bound and astricted as aforesaid, “to have admitted and inducted him into the office of minister “of the church and parish of Auchterarder.” The summons, therefore, subsumes “that the pursuer is *duly qualified, as a licentiate of the Church of Scotland, and presentee foresaid, as well “as in all other respects, to be received and admitted minister of the “church and parish of Auchterarder*; and though no objections “have been stated against his qualifications, the presbytery not “only refused, and continue to refuse, to take the pursuer upon “trials, and to pronounce judgment upon his qualifications as presentee, or to admit and receive him as minister of the church “and parish of Auchterarder; but have, by their sentence, rejected him as presentee to the said church and parish, *without “trial, without taking cognisance of his qualifications as presentee, and expressly on the ground that they cannot and ought “not do so, in respect of a veto of the parishioners; in all which “respects the said presbytery, and the individual members thereof, have exceeded the powers conferred on them by law, and acted “illegally in violation of their duty, and of the laws and statutes “libelled, and that to the serious prejudice of the patrimonial rights “of the pursuers. And although the pursuers, as patron and “presentee foresaid, have often desired and required the said “presbytery, and the individual members thereof, to discharge “their duty in terms of law and the statutes libelled, by proceeding “with the trials, admission, and final settlement of the pursuer, the “said Robert Young, as minister of the church and parish of “Auchterarder; yet they illegally, contumaciously, and in violation of their duty, and to the serious injury and prejudice of the “patrimonial rights of the pursuers, refused, and continue to refuse, “so to do.” And, therefore, the summons concludes, that it ought*

and should be found and declared, (1st,) “ That the pursuer, the
 “ said Robert Young, has been *legally, validly, and effectually pre-*
 “ *sented* to the church and parish of Auchterarder. (2d,) That
 “ the presbytery of Auchterarder, and the individual members
 “ thereof, as the *only legal and competent court to that effect by law*
 “ *constituted, were bound and astricted to make trial of the qualifi-*
 “ *cations of the pursuer, and are still bound so to do ; and if, in*
 “ *their judgment, after due trial and examination, the pursuer is*
 “ *found qualified, the said presbytery are bound and astricted to*
 “ *receive and admit the pursuer as minister of the church and*
 “ *parish of Auchterarder, according to law.* (3d,) That the *re-*
 “ *jection* of the pursuer by the said presbytery, as presentee fore-
 “ said, *without making trial of his qualifications* in competent and
 “ legal form, and *without any objections having been stated to his*
 “ *qualifications, or against his admission as minister of the church*
 “ *and parish of Auchterarder, and expressly on the ground that the*
 “ *said presbytery cannot and ought not to do so, in respect of a veto*
 “ *of the parishioners, was illegal, and injurious to the patrimonial*
 “ *rights of the pursuer, and contrary to the provisions of the sta-*
 “ *tutes and laws libelled.*”

And it being so found, or in the event of the presbytery continuing to refuse to discharge their duty, by proceeding in the trials of Mr. Young as presentee, and in his induction, if qualified ; the second conclusion is,—that it should be found and declared that Mr. Young has right to the stipend, with the manse and glebe, and other emoluments pertaining to the church and parish of Auchterarder during his life : And it being so found and declared, the next conclusion is,—that the presbytery and the trustees for the Ministers' Widows' Fund, should be decerned and ordained to cease from disturbing the pursuer, Mr. Young, in the enjoyment during his life, of the stipend and other emoluments of the cure aforesaid : And lastly, there is a conclusion against the heritors, for payment of their respective portions of the modified stipend of the parish, and for implement of all their other obligations to Mr. Young, as having been effectually presented to the church and parish of Auchterarder. These are the first set of conclusions. But the summons contains *alternative* conclusions, to the effect that the Earl of Kinnoull, having validly exercised his right as patron in favour of a qualified presentee, against whom no objection has been stated, and who has been illegally rejected, should have right to retain the stipend, and whole emoluments pertaining to the church and parish ; and the declaratory conclusion to that effect is followed, by the same subsidiary conclusions against the trustees of the Ministers' Widows' Fund, and the heritors of the parish, as in the case of the original conclusions.

In defence against the action, the presbytery have maintained : *First*, That the presentee has no title and interest to maintain the action ; in respect his right to the stipend and other emoluments of the benefice depends on his act of ordination : And, *Secondly*, That the patron has no title and interest to pursue, in respect that the right conferred on him by the statute 1592, ch. 117, to retain the vacant stipend has been taken from him and conferred on the trustees for the Ministers' Widows' Fund. To these preliminary objections, the pursuers have a sufficient answer to which they will afterwards advert.

But the presbytery further say that they acted exclusively in their ecclesiastical capacity in the rejection of Mr. Young, and consequently that this court has no jurisdiction to interfere in the matter, or to afford any relief to the pursuers or either of them : More particularly, that they were acting in the process of conferring the pastoral office, and that Mr. Young was rejected because of the insufficiency of the call to confer the pastoral relation ; but that, even though the interim act of Assembly and relative regulations did not relate to the matter of the call, the veto of a majority of the people is a test of the presentee's qualification, and that it was in the power of the Church to prescribe it as a test of qualification accordingly. Their plea, and the extent to which they carry the powers of the Church, will best appear from the following sentence in the pleadings for the presbytery, (p. 43.) " Now, even although it could be held that these regulations did not refer to the matter of the call, but *established a new requisite* before the Church would admit a presentee ; yet " if it was truly in the proper process of conferring the pastoral " office, it would not be beyond the powers of the Church, seeing " that the *whole matter of conferring the pastoral office is within her exclusive jurisdiction*, as declared in the act 1592, and that " she therefore must have the sole power of regulating THE MODE " in which it is to be conferred, *and of prescribing THE REQUISITES AND CONDITIONS ON WHICH SHE WILL BESTOW IT.*

Here then the question is distinctly raised, whether the church can prescribe the requisites and conditions on which she will bestow the pastoral office, however inconsistent those requisites and conditions may be with the civil right of patronage—and whether the absolute dissent of a section of the congregation, who may never have seen the presentee any more than the presbytery did—is a requisite such as the church were entitled to prescribe as a test of qualification in a presentee. That the presbytery in rejecting Mr. Young were only following the directions of the interim act of the General Assembly, is nothing to the purpose in the present question. It may exempt them from censure or question in the ecclesiastical courts of review, but in relation to the civil interests of

parties, if the presbytery exceeded their power, and infringed the patrimonial rights of the pursuers, it can be no defence to them to say, that they only followed the directions of their superiors, whose orders they were bound to obey. If the act done was within the power of the church, and if there was no infringement of the patrimonial rights of the pursuers, the rejection of the presentee must be submitted to by them. But on the other hand, if the act was an illegal one, no direction given to the presbytery by their superiors can render it legal.

The only statements in The Record of the cause which it is of importance to bring under the notice of your Lordships, are those contained in the 10th and 11th articles of the condescendence for the pursuers. In article 10 they aver, "That the pursuer, the Rev. Robert Young, was duly qualified as a licentiate of the Church of Scotland, and as holding a valid and effectual presentation to the church and parish of Auchterarder, as well as in all other respects, to be admitted and received minister of the said church and parish; and though no special objections were stated against his qualification or settlement, the presbytery did not take the pursuer upon trials, and pronounce judgment on his qualifications as presentee foresaid, but refused, and still refuse to do so, and to admit and receive him as minister of the said church and parish." It was undoubtedly within the knowledge of the presbytery, that Mr. Young is a qualified licentiate of the Church of Scotland; yet their answer to the averment is "Not admitted." In like manner, having sustained the presentation in his favour, one would have thought they might have admitted that the presentation was a valid and effectual one; yet that also is "not admitted." Next, their own record shews that no special objections were stated against Mr. Young, and that the presbytery did not take him upon trials and pronounce judgment on his qualifications; yet these averments also are "not admitted." And neither is it admitted that the presbytery refused and continued to refuse to admit him as minister of the church and parish of Auchterarder. The pursuer had a right to expect and receive, either a positive admission, or denial, of statements which were necessarily within the knowledge of the presbytery. But the material averment on which the action is rested, is admitted. In the 11th article of the condescendence the pursuers say, "That the foresaid sentence, whereby the presbytery rejected the Rev. Robert Young, pursuer, as presentee to the church and parish of Auchterarder, proceeded exclusively on the ground of the veto, or dissents exercised by the alleged majority of heads of families, or parishioners of Auchterarder." And on the part of the presbytery the answer is "admitted." Consequently there is no room to question the ground on which

the presentee or presentation were in this instance rejected, nor the period at which the rejection took place. For it is not pretended that the presbytery of Auchterarder ever saw Mr. Young, or put a question to him to test his qualifications for the office of minister of the church and parish to which he was legally presented.

If I were to enter into any historical disquisition as to the origin of the right of patronage of churches, or into the question which has frequently been agitated—whether patronage is consistent with the Presbyterian form of church government—I should be occupying the time of the court very unnecessarily. The patronage of a church and benefice is admitted to be a civil right. It has for centuries existed in connection with presbytery as well as with prelacy; and it is enough for the purposes of the present inquiry, that, according to subsisting statutes and the authority of every Institutional writer, patronage is a civil or patrimonial right, which may, like other patrimonial rights, be enforced in the civil courts.

I do however maintain, that a patron's right is, in its nature, absolute and unqualified, or that it confers on him the power of presenting to a church and parish whomsoever he pleases, or at any time. By the compact to which the Church of Scotland, as by law established, owes its existence, and derives its authority and support, the rights of lay patrons are on the one hand as clearly acknowledged, as are the obligations of the church courts on the other hand, to give full effect to the right when lawfully exercised. The exercise of the right is, however, admitted to be qualified by certain established conditions:—1st, The patron must qualify himself for the exercise of it by taking the oaths to government. 2d, He can only present to a benefice a person who has received the stamp of the church court as being qualified to accept and hold the presentation, and in the judgment of the presbytery, after due examination and trial of his qualifications, to be inducted to the particular benefice. 3d, The patron must exercise his right by presenting within a limited time after the vacancy has taken place, otherwise by statute the right of presentation devolves upon the presbytery of the bounds; and, lastly, It is a test of the qualification of the presentee that he also shall have taken the oaths to government,—that he shall by letter declare his acceptance of the presentation, and exhibit to the presbytery what is termed “the parochial certificate,” or attestation by the clergyman under whom he lives, that he is a person fit to be received into the office of the ministry.

These requisites are prescribed by civil statute. They are known limitations on the exercise of the right of patronage; but under such limitations the right is as undoubted as any other patri-

monial right known in law. And it is important to attend to the terms of the deed by which the right is invariably exercised, and which, I am told by very high authority, are the terms which have been in use since the legal establishment of presbytery in 1592. Unquestionably the form has very long been recognized and acted upon, both by the civil and ecclesiastical courts. The deed sets forth the title of the Earl of Kinnoull as patron of the church and parish—the vacancy, in consequence of the death of the prior incumbent, and the right of gift and presentation thence arising to the patron—and then it proceeds as follows:—“And I being sufficiently informed of the literature, loyalty, *qualifications*, good life and conversation of Mr. Robert Young, preacher of the gospel, residing at Seafeld Cottage, Dundee, do therefore, by these presents, *Nominate* and *Present* the said Robert Young to be minister of the said parish and church of Auchterarder, during all the days of his lifetime, giving, granting, and disposing to him the constant localled and modified stipend, with the manse and glebe, and other profits and emoluments belonging to the said church, for the crop and year 1835, and during his lifetime, and his serving the cure at the said church. *Requiring hereby* the Reverend Moderator and Presbytery of Auchterarder *to take trial of the qualifications, literature, good life and conversation of the said Robert Young; and having found him fit and qualified for the function of the ministry at the said church of Auchterarder, to admit and receive him thereto, and give him his act of ordination and admission in due and competent form; Recommending hereby* to the Lords of Council and Session, upon sight of this presentation, and the said presbytery's act of ordination and admission, to grant letters of horning on a simple charge of ten days only, and other executorials necessary, at the instance of the said Robert Young against all and sundry the heritors,” &c.

The right of patronage, Lord Bankton says, imports honour, interest, and burdens. The honourable part used to consist in the *personal exhibition* of the presentee, the patron at the same time *requiring* the church court to receive and admit him. The ceremonial part of the act, however, has long been dispensed with, and the presentation, as the name of the instrument implies, is the first thing done by the patron. The second part of the deed consists of the *disposition* to the stipend, manse, and glebe, and other profits and emoluments of the benefice, during the life and incumbency of the presentee. The *third* consists of the legal *requisition upon the Moderator and Presbytery* to take *trial of the presentee's qualifications*, and having found him fit and qualified for the functions of the ministry at the particular church, to admit and receive him thereto by the presbyterial act of ordination and admission in

common form. And the last part of the deed consists of the patron's recommendation to the civil court to interpose its authority, to the effect of granting letters of horning on a charge, and all other executorials necessary, against the heritors and others liable in payment of stipend.

While, therefore, the exercise of the patron's right by the execution of a formal deed of presentation and disposition vests various interests and privileges in the presentee, it is nevertheless the right and the duty of the presbytery, to whom the presentation is directed, and of the higher church judicatories in succession, *to judge of his qualifications*. By the compact establishing the Church of Scotland, as will be seen immediately, the presbytery have no discretion in the matter. It is a duty or obligation the performance of which they are astricted to by statute, and therefore they can neither legally refuse to discharge it themselves, nor devolve the execution of it upon any third party whatsoever. They are bound to act *judicially* upon the presentation in favour of a qualified presentee, being either an ordained minister or a licentiate of the church. They act as a court whose sentences are subject to the review of the superior judicatories; and no more therefore can they devolve the obligations which the law has imposed upon them, of exercising *their own judgment* upon the qualifications of a presentee, than your Lordships could devolve the adjudication of this cause on others. The quality or condition which the church has recently chosen to attach to the exercise of the patron's right is, in fact, a devolution of the duty which, by the constitution of the church, as by law established, is vested in the presbytery, and in them alone. As well might your Lordships say you could not judge in this cause, because it was contrary to the will of others that you should do so, as that the presbytery of Auchterarder should reject Mr. Young, merely because of the arbitrary *veto* of certain parishioners whose names stand upon a certain roll. If his rejection on such a ground be not an infringement of the patrimonial rights of a patron and a presentee, I am really at a loss to know what can be held an infringement of their rights short of the church's attempting an absolute repeal of all the statutes by which the rights of patrons are established.

The arbitrary dissent of a section of the congregation, is an entirely new restriction on the right of patronage. Not an instance of it has as yet been pointed out, from the establishment of the presbyterian form of church government until the present case occurred in the year 1834. And I undertake to establish that it is a restriction inconsistent not only with the fair exercise of the civil right of patronage, as a part and portion of the law of the church as established under the compact by which alone the Church of Scotland has any authority as a national religious establishment

but with the very principle of presbytery itself. It never can be a test of qualification ; for how can a patron ascertain before-hand, which he must be presumed to do, whether the majority of the male heads of families are to dissent from the settlement of the presentee or not ? To speak of it as a test of qualification, therefore, is out of the question. On the other hand, if the patron is, before presenting, to consult and obtain the sanction of these parties for his presentee, he is in that way compelled to make the congregation, or a section of them, sharers in his patrimonial right. But farther, if it be a test of disqualification, the presbytery, instead of judging of the qualities of a presentee themselves, are thus devolving their highest and most important right, the judging of the qualification of the presentees, upon others, and that, too, though in their own judgment the presentee was the fittest man in the Church of Scotland for filling the office of minister in the particular parish.

An absolute dissent by a section of the congregation on the exercise of the patron's right is, I say, an element equally foreign to the constitution of the Established Church and subversive of it, as it is of the patrimonial rights and privileges of patrons and presentees. By the compact with the state, whereby the church obtained the authority and privileges of an establishment, mutual checks were imposed on the patron on the one hand, and on the church courts on the other ; but no other functionaries were acknowledged or recognised as judges of the qualifications of presentees, or as parties otherwise to the compact. The people have often repudiated the law of patronage as being inconsistent with presbytery, and have claimed the initiative in the nomination of ministers as *jure divino* belonging to themselves. But they did so under the impression of what they thought presbytery ought to be, and not according to what presbytery *was as by law established*. They have never claimed the right to judge of the presentee's qualifications ; and there is not in the history of the church any recognition of a right on their part to exercise a *veto* on the patron's nomination, or interpose an effectual barrier betwixt the presentee and the presbytery's duty and obligation to judge of his qualifications for the office of the ministry. I shall show by and by, that even during the period while patronage was abolished, and the appointment vested in the people, the right to judge of the presentee's qualification remained with the presbytery, subject to the review of the superior judicatories, at the suit either of the presentee, if the judgment was against him, or of the objectors, if they thought sufficient weight had not been given to their objections, or to the evidence adduced in support of them.

Whether the compact betwixt the church as established, and the state, ought to have been different in its terms and nature,

is a question which cannot now be entered upon. The compact must be judged of as it is. But undoubtedly it was as lawful for the civil power to stipulate that the church courts should be obliged to judge of the qualifications of presentees, and to admit and receive them if qualified, when presented to particular livings, as that the church should receive not only the sanction and authority of the state, but endowments and support for her clergy. And the conditions in favour of patrons, (at the same time devolving the performance of certain relative duties on the part of the church courts) being lawful, they cannot be either directly or in substance violated by the introduction, on the part of the church alone, of an element or condition into the process of settling presentees, which is subversive not only of their patrimonial rights, but calculated to endanger the security of the church establishment itself. I am not aware that any lawyer ever has alleged, that there are any principles in the ecclesiastical constitution of the Church of Scotland inconsistent with the law of patronage, and the civil rights and privileges which that law confers.

I now request your Lordships' attention to the several statutes on the subject of patronage, and to some historical details which may not be deemed unimportant in the consideration of the present question, a review of all which will, I humbly hope, satisfy the court of the correctness of the observations which I have submitted.

The period at which the Reformation from Popery in Scotland is usually dated is the year 1560. The Papal jurisdiction was then abolished; but the enactment not having been regularly authorised by the Sovereign, was deemed liable to objection, and therefore it was ratified by the statute 1567, c. 2.

It was in the year 1560 that the FIRST BOOK OF DISCIPLINE was prepared by *Winram, Spottiswoode, and Knox*. But it never was sanctioned, and consequently never became the law of the church. It is understood to have been very hastily prepared, and to require the revision which it afterwards obtained before the publication of the Second Book in 1578.

I may mention as a fact in the history of this period, that the first General Assembly was held in December 1560, and that there was laid before them "*a presentation* by Sir John Borthwick in favour of John Ramsay, as minister of Aberdour" and Torry," and that the right to give the presentation was not disputed by the church. Farther, at that time, though the jurisdiction of the Pope was abolished by statute, the Popish clergy were still in possession of all the benefices in Scotland. The reformed clergy consisted of a few superintendents and parochial ministers, who had not then even the prospect of THE THIRDS of

benefices which were afterwards set apart for their support by the statute 1567, c. 10. They were in consequence entirely dependent on the people, and hence perhaps the opinions, even of the most eminent among them were naturally *prudential* in all matters relating to the polity of the church. Nevertheless, neither the *divine right of election*, now supposed by some to belong to the people, nor a right of *veto* on a patron's choice, was conceded by the reformers of 1560. What they conceded to the people was *a liberty* to elect, the tendency of all their propositions being rather *to place the actual power of nomination in the clergy themselves*.

From the commencement of the Reformation it was a common subject of complaint and remonstrance, that the right of collation by the church was disregarded, and persons settled by the *absolute* gift of patrons, without admission on the part of the church, and that blank presentations to benefices were exposed to sale, and purchased by persons wholly unqualified for the ministry. Patrons, it was alleged, endeavoured to exercise an unlimited right of nomination, against which the church remonstrated, and endeavoured to vindicate her right of trial and admission of presentees. At length, in the General Assembly held in the year 1565, an adjustment of the matters in dispute was effected by a sort of compromise, and the Assembly, in a Reply or message sent to the Queen, which your Lordships will find in *Petrie's History of the Church*, p. 349, expressed their opinion concerning the proper method of settling vacant parishes, thus:—"Our mind is not that her majesty or "any other patron should be deprived of their just patronages, but we mean, whensoever her majesty or any other patron do present any person into a benefice, *that the person presented should be tried and examined by the judgment of learned men of the church, such as are the present superintendents*, and as *the presentation unto the benefice appertains unto the patron, so the collation by law and reason belongs unto the church*; and *the church should not be defrauded of the collation no more than the patrons of the presentation*; for otherwise, if it be *lawful to the patrons to present whom they please, without trial or examination*, what can abide in the church of God *but mere ignorance?*" When the presbyterian church government came to be established, it will be seen that the spirit of this Reply was followed by the Legislature.

The Act of Parliament, 1567, c. 6. "Anent the trew and haly kirk and them that ar declared not to be of the samin," declares, "that the ministers of the blissed evangel of Jesus Christ, quhome God in his mercie hes now raised up amangs us, or heirafter sall raise, agreeing with them that now lives in doctrine and administration of the sacraments, and the peopill of the realme that professis Christ, as he is now offered in his evangel, and dois communicate with the halie Sacraments (as in the re-

“formed Kirkes of this Realme ar publicklye administrate,) according to the confession of the faith, to be the trew and halie Kirk of Jesus Christ within this realme, and decernis and declares, that all and sindrie, quha outhir gainsayis the word of the evangel, received and apprevd as the heads of the confession of the faith professed in Parliament of befoir, in the zeir of God, 1560 zeires: As alswa specified and registrat in the actes of Parliament maid in the first zeir of his Heinesses reigne, mair particularlie dois expresse, ratified alswa and apprevd in this present Parliament; or that refusis the participation of the halie Sacraments as they ar now ministrat; to be na members of the said Kirk, within this realme and trew religion, now presently professed. Sa lang as they keep themselves sa divid-ed from the societie of Christ's body.”

But this act, it will be observed, has relation to those who are or are not to be considered members of the church of Christ, and does not relate to the kirk as established, or to its judicatories as possessed of jurisdiction and government. And when your Lordships look to the first chapter of the second Book of Discipline, you will find the distinction very fully recognised. Though the act 1567 has sometimes been cited in support of the doctrine, that the people have the right to choose their own pastors, it has truly no bearing even on that question. The object of the Legislature at the time being merely to establish who should be considered of the Reformed Protestant faith according to the confession of faith ratified by Parliament in 1760.

But in 1567, another act was passed, (c. 7), which is entitled “*Anent the admission of Ministers; of Laick Patronages,*” which is as follows:—“It is statute and ordained by our Sovereine Lord, with advise of his dearest Regent and three estaites of this present Parliament, that THE EXAMINATION and ADMISSION of ministers within this realme be *only* in the power of the kirk now openly and publicly professed within the samin. *The presentation of laic patronages alwaies reserved to the just and ancient patrones.* And that the patrone present *ane qualified persoun* within six monethes (after it may cum to his knowledge of the decease of him quha bruiked the benefice of before,) to the *superintendent of thay partis* quhair the benefice lyes or uthers havand commission of the kirk to that effect; utherswaies the kirk to have power to dispone the samin to *ane qualified person for that time.*

“Providing that in caice the patron present ane person qualified to his understanding, and failzing of ane, ane uther within the said six moneths, and the said superintendent or commissioner of the kirk refuses to *receive and admit the person* presented be the patron as said is: It sall be lesum to the *patron* to appeale to the *superintendent* and ministers of *that province*

“ *quhair the benefice lyes*, and desire the person presented to be admitted, *quhilk gif they refuse*, to appeale to the General Assembly of the haill realme, be quhome the cause beand decyded, sall take end as they decerne and declair.”

Presbyteries were not legalized for some time after, and the object of the Legislature seems to have been to vest the power of examination and admission of ministers in the kirk, not so much in opposition to the civil authority, as to the Popish clergy, who were still in possession of the greater portion of the livings. At the same time that the presentation of laick patronages is reserved to patrons, the exercise of the right is so qualified that they could only present to the superintendent of the bounds—not whom and when they pleased—but “ane qualified person,” and that within six months from the time when “they were informed of the death of the prior incumbent,” otherwise the kirk to have the power to dispoise the samin to “ane qualified person for that time.” The superintendent who then exercised the functions of the local church court, was bound to exercise *his judgment* by examining the qualifications of the presentee, and if he found him qualified to admit him. But there is not the slightest trace of any right of *veto* or dissent without cause shewn, more than there is of *election* on the part of the people. On the contrary, the superintendent’s judgment on the presentee’s qualifications *being subject to review* by the superintendent and ministers of the province, and from them again by an appeal to the General Assembly, excludes the notion of a *veto* being competent to the people. Moreover, if the superintendent *found the presentee qualified* no appeal was competent. The right of appeal was given to the patron only. The people, it is presumed, might state and *substantiate* objections to the presentee’s qualifications; but if they were repelled by the church court the judgment was final. But as to the congregation being judges, or their possessing a right of *veto* on the patron’s appointment, the act 1567 gives no authority for the idea. Furthermore it will be observed, that it is the right of *examination and admission*, which is vested in the church court; and the examination of course, behoved to precede the judgment to be pronounced on the qualifications of the person presented; and the matter upon which appeals might be taken from his judgment by the patron related to the presentee’s qualification and to that alone.

The last clause of the statute declares, that upon an appeal taken by the patron to the General Assembly and the cause being decided, it “sall take end as they decerne and declare.” The presbytery of Auchterarder maintain that the effect of this clause is, that all sentences of the highest church court, in relation to the trial and induction of minsters are final and *conclusive* to all intents and

purposes. But, as will be seen hereafter, this is just another way of stating that the church courts can do no wrong to a patron or presentee, of which your Lordships can take cognizance. It necessarily raises the question whether the *veto* is a legal and admissible element in estimating the qualifications of a presentee—or whether it is not something totally different—something of the nature of a condition precedent upon the patron's right, which is inconsistent with all those known tests of qualification which have heretofore been recognised and acted upon, and which in this very case were so far acted upon by the presbytery's declaration, that the patron and presentee had fully complied with the legal requisites, and therefore they sustained the presentation. But to this point the pursuers shall have occasion hereafter to advert more particularly.

The Second Book of Discipline, or “Heidis and conclusions of the Policie of the kirk” was compiled by Andrew Melville, whose opinions on matters of church polity did not altogether coincide with the opinions of those who framed the First Book of Discipline. He seems to have thought, that the *election* of ministers should be by presbyteries, adjecting at the same time the consent, assent, or will of the congregation. And accordingly, in the Second Book of Discipline, which was approved of by the General Assembly in 1578, and registered in the minutes of Assembly 1581, and in chap. 3, which treateth of “How the persons that beir ecclesiasticall functions are admitted to their office”: Election is described (sect. 3) as “The choosing out of a person or persons most able for the office that vakes, *by the judgment of the eldership* and *consent* of the congregation to whom the person or persons are appointed. The *qualities in general requisite* in all them who should bear charge in the kirk, consist in soundness of religion and godliness of life, according as they are set forth in the word.” And (sect. 6,) “In the order of election it is eschued, that nae person be intruded in any offices of the kirk, contrary to the will of the congregation, to which they are appointed, *or without the voice of the eldership.*” This is what was desired to be fixed as the law of the church. But to the *heads of reformation claimed* by the church, and which terminated in the act 1592, c. 116, your Lordships' attention shall be directed immediately.

The same General Assembly by which the Book of Discipline was ratified, recorded a declaration that patronages should remain wholly unjointed and undivided, unless with the consent of the patron. And in 1581 it was enacted by the Legislature, (c. 102,) “that all benefices of cure under prelacy shall be presented by our Sovereign Lord and the laick patrons, in favour of *able and qualified ministers*, apt and able to enter into that function and to discharge the duty thereof.” And in 1587,

another act was passed, ordaining “that laick patrons may freely use their patronages, and *present qualified persons thereto* at all times.” These statutes and others define to a certain extent what was meant by the term qualified, and shew that the qualification was in *the presentee himself*—in the measure of his talents, acquirements and zeal; that it was in its nature *personal*—something in the candidate for the ministry which *could be known to patrons*, and be appreciated and tested by means of examination and trial on the part of the Ecclesiastical Courts.

The Second Book of Discipline was presented by the General Assembly to the Legislature for its sanction, as the code of polity for the government of the church. But your Lordships will find, on comparing what was *sought* by the church on the one hand, and what was *conceded* by the civil power on the other, that the compact which was concluded by the celebrated statute 1592, c. 116, (commonly designated *The Charter of Presbytery*,) did not recognise or sanction as law, what was claimed on the part of the church in regard to *the election of ministers*.

In addition to the clauses already quoted from chap. 3, the *Second Book of Discipline*, in chap. 7, which treats “of the Elderships, and Assemblies, and Discipline,” contains the following sections in reference to the powers of *presbyteries* in particular, in whom, by the prior section, it was proposed to vest the power of electing ministers:

Sect. 11. “The power of thir particular elderships, (presbyteries) is to use diligent labours in the bounds committit to thair charge, that the kirks be kept in gude order, to inquire diligently of nauchtie and unruly persons, and to travell to bring them in the way againe, aither be admonition or threatening of God’s judgments, or be correction.

“Sect. 12. It pertaines to the eldership to take heid, that the word of God be purely preicht within their bounds, the sacraments rightly ministrat, the discipline rightly mantenit, and the ecclesiasticall gudes uncorruptlie distributit.

“Sect. 13. It belongs to this kind of assemblie to cause the ordinances made by the assemblies provincially, nationall, and generall, to be kept, and put in execution. To mak constitutions; quhilk concerne to *prepon* in the kirk, for the decent order of these particular kirks where they governe: Provyding they alter no rewls made by the General or Provincially Assemblies, and that they mak the Provincially Assemblies foresein of these rewls that they sall mak, and abolish them that tend to the hurt of the same.

“Sect. 14. It has power to excommunicate the obstinat.

“Sect. 15. *The power of Election of them who beir ecclesiastical charges, pertaines to this kynde of assemblie, within thair*

“ *awin boundes, being well erectit, and constitute of many pastors*
 “ *and elders of sufficient abilitie.*

“ Sect. 18. Provincial Assemblies we call lawful conventions of
 “ the pastors, doctors, and other elders of a province, gatherit for
 “ the common affairs of the kirkes thereof, quilk also may be
 “ callit the conference of the kirk and brethren.

“ Sect. 19. Their assemblies are institute for weighty matters,
 “ to be intreatit be mutuall consent and assistance of the brethren
 “ within that province, as neid requyres.

“ Sect. 20. This assemblie has power to handle, order, and re-
 “ dresse all things omited or done amisse in the particular assem-
 “ blies. It has power to depose the office-bearers of that pro-
 “ vince for gude and just causes deserving deprivation. And
 “ generallie thir assemblies have the hail power of the particular
 “ elderships whairof they are collectit.

“ Sect. 21. The national assemblie quhilk is generall to us, is
 “ a lawful convention of the hail kirks of the realm or nation,
 “ where it is usit and gathered for the common affairs of the kirke,
 “ and may be callit the general eldership of the hail kirk within
 “ the realme. None are subject to repaire to this assemblie to
 “ vote bot ecclesiastical persons to such a number as shall be
 “ thocht gude be the same assemblie, not excluding other per-
 “ sons that will repaire to the said assemblie to propone, heare and
 “ reason.

“ Sect. 22. This assemblie is institute, that all things aither
 “ omittit, or done amisse in the provincial assemblies, may be
 “ redressit and handlit; and things generally serving for the well
 “ of the hail bodie of the kirk within the realme may be foreseine,
 “ intreatit and set furth to Godis glorie.

“ Sect. 23. It sould tak cair, that kirks be plantit in places
 “ quhair they are not plantit. It should preseryve the rewll how
 “ the other twa kynds of assemblies should proceed in all things.

“ Sect. 24. This assemblie *sould take heid that the spirituall*
 “ *jurisdiction and civill be not confoundit to the hurt of the kirk.*
 “ That the patrimonie of the kirk be not consumit nor abusit:
 “ And generallie concerning all weighty affairs that concerne the
 “ weill and gude order of the hail kirks of the realm, it aucht to
 “ interpone autoritie thairto.”

I now very particularly request the attention of your Lord-
 ship's while I read the statute 1592, c. 116, which is entitled
 “ Ratification of the liberty of the trew Kirk; of General and
 “ Synodal Assemblies; of Presbyteries; of Discipline; all Lawes
 “ of Idolatrie are abrogate; of *Presentation to Benefices*,” First
 of all, it ratifies certain acts, (which are enumerated) in fa-
 vour of “ the trew kirk.” And sicklike ratifies and appreivis,
 “ the *General Assemblies* appointed be the said kirk; and de-

“ clares, that it *sall be lauchful* to the kirk and ministers every
 “ zier at the least, and oftner *præsenata* as occasion and ne-
 “ cessity sall require, to hald and ~~large~~ General Assemblies;
 “ PROVIDING THAT THE KING'S MAJESTY, OR HIS COMMISSIONERS,
 “ WITH THEM TO BE APPOYNTED, BE HIS HIENESSE, BE PRESENT AT
 “ ILK GENERALL ASSEMBLIE, BEFORE THE DISSOLVING THEREOF,
 “ NOMINATE AND APPOYNT TIME AND PLACE, QUHEN AND QUHAIR
 “ THE NIXT GENERALL ASSEMBLY SALL BE HALDEN; and in case
 “ naither his Majesty, nor his said Commissioners beis present for
 “ the time in that toun quhair the said General Assembly beis hal-
 “ den; then and *in that case*, it shall be lesum to the said General
 “ Assembly, be themselves, to nominate and appoynte time and
 “ place quhair the nixt Generall Assembly of the Kirk shall be
 “ keiped and halden, as they have been in use to do thir times
 “ bye past,—and also ratifies and appreives the SYNODICALL AND
 “ PROVINCIAL ASSEMBLIES to be halden be the said kirk and
 “ ministers, twise ilk zier, as they have beene, and ar presently
 “ in use to do within every province of this realme; and ratifies and
 “ appreivis the PRESBYTERIES and PARTICULAR SESSIONES, ap-
 “ poynted be the said kirk, with the *hail jurisdiction and dis-*
 “ *cipline* of the same kirk AGGREID UPON BY HIS MAJESTY IN CON-
 “ FERENCE HAD BE HIS HIENESSE, WITH CERTAINE OF THE MINIS-
 “ TERS, CONVEANED TO THAT EFFECT. OF THE QUILKES ARTICLES
 “ THE TENOR FOLLOWS:

“ Maters to be intreated in *Provincial Assemblies*. Thir Assem-
 “ blies are constitute forweichie maters, necessar to be intreated be
 “ mutual consent, and assistance of brethren, within the province, as
 “ neede requires. This assembly has power to handle, ordour and
 “ redresse, all thinges omitted or done anisse in the particular as-
 “ semblies. It hes power to depose the office-bearers of that
 “ province, for gude and just cause, deserving deprivation: And
 “ generally, thir assemblies has the hail power of the particular
 “ eldershipps whereof they are collected.”

“ Maters to be entreated, in the *Presbyteries*: The power
 “ of the presbyteries is to give diligent laboures in the boundes
 “ committed to their charge. That the kirks be kept in
 “ guide ordour; to enquire diligently of naughty and ungodly
 “ persons; and to travel to bring them in the way againe be
 “ admonition, or threatening of God's judgements, or be cor-
 “ rection. It appertains to the elderschippe to take heede that
 “ the word of God be purely preached within their boundis;
 “ the sacraments richtely ministered, the discipline entertained;
 “ and ecclesiastical guddes uncorruptly distributed. It belangis
 “ to this kinde of assemblies to cause the ordinances maid be
 “ the Assemblies, provincialles, nationalls, and generalls, to be
 “ kepted and put in execution, to make constitutions quhilk con-

“cernis to *prepon* in the kirk, for decent ordour, in the particular kirk quhair they governe, providing that they alter no rules maid be the provincial, or General Assemblies; and that they make the provincial Assemblies, foresaids, privy of the rules that they sall make, and to abolish constitutions tending to the hurt of the same. It has power to excommunicate the obstinate, formal process being led, and dew interval of times observed. Anent *particular Kirks*, gif they be lauchfully ruled, be sufficient ministry and session. They have power and jurisdiction in their awin congregations, in maters ecclesiastical. And decernis and declairis the saids *Assemblies, Presbyteries, and Sessions, jurisdiction and discipline thereof foresaid*, to be in all times cumming maist just, gude, and godly in theselse, notwithstanding of quhat-sumever statutes, actes, canone, civill or municipal lawes, made in the contrare. To the quhilkis and every ane of them, thir presentes sall make express derogation. And because there are divers acts of Parliamen, maid in favour of the papisticall kirk, tending to the prejudice of the liberty of the true kirk of God, presently professed within this realme, jurisdiction and discipline thereof; quhilk stands zit in the buikes of the acts of Parliament, nocht abrogated nor annulled. Therefore his hienesse and estaites foresaids, has abrogated, cassed, and annulled, and be the tenour hereof abrogatis, cassis, and annullis, all acts of Parliament maid be any of his hienesse predecessors, for maintainance of superstition and idolatry, with all and quhatsumever acts, lawes, and statutes, maid at any time before the daye and dait hereof, against the liberty of the trew kirk, jurisdiction, and discipline thereof, as the samin is used and exercised within this realme.”

Thus the statute adopts not merely the substance, *but the very words*, of the 11th, 12th, 13th, and 14th sections of the 7th chapter of the Second Book of Discipline. But the 15th section of that chapter, as well as the 3d and 5th sections of chapter 3, (both of which I have read) were, at the *conference rejected*. And accordingly, all that portion of the Book of Discipline which relates to the *election of ministers*, forms *no part of the compact* by which the Church of Scotland was established, and, consequently, no part either of the civil law or of the law of the church as established. For it is conceded that the Second Book of Discipline is only to be understood even *as the law of the church*, in so far as it received the sanction of the Legislature by the statute 1592, c. 116.

After adopting so far the Second Book of Discipline, and rejecting other portions of it—and again *adding all those conditions as to the power of the church to hold General and Provincial Assemblies*, the statute 1592 proceeds to repeal all laws for the purpose of superstition and idolatry, and all laws recognising the pope's au-

thority:—" *Item*, the king's majesty, and estates forsaidis, declaris, that the 129 act of the P. 1584, sall nawayes be preduciall, nor derogate ony thing to the privilege that God has given to the spiritual office-bearers in the kirk, concerning heads of religion, matters of heresie, excommunication, *collation*, or deprivation of ministers, or ony sic like essential censures, specially grounded and having warrand in the word of God." It repeals the act 1584, "granting commission to bishoppes and utheris, judges constitute in ecclesiastical causes, to receive his hienesse presentations to benefices, *to give collation thereupon*; and to put ordour in all causes ecclesiastical: quhilk his majesty and estaitis foresaidis declaris to be expired in the selfe, and to be null in time cuming, and of nane avail, force or effect. And therefore ordains *all presentations to benefices to be directed to the particular Presbyteries* in all time coming: with *full power to give collation THEREUPON*; and to put ordour to all *matters and causes ecclesiastical*, within their boundis, according to the discipline of the kirk: PROVIDING *the foresaid presbyteries be BOUND AND ASTRICTED to RECEIVE and ADMIT QUHATSUMEVER QUALIFIED MINISTERS PRESENTED BE HIS MAJESTY OR LAICK PATRONES.*"

And by the immediately following statute, (1592, c. 117,) it is enacted, That *unqualified* persons, who had already been inducted to the pastoral office, should be deprived of the office and whole fruits of the benefice. The sentences of disqualification and deprivation to be pronounced by the presbytery, are subject to the review of the Synod and General Assembly; and the exclusion of the incumbent from the fruits of the benefice to be by way of civil action, exception, or reply. And then it is enacted, that the said sentence of deprivation, sall be ane sufficient cause to make the said benefice to vaik thereby. And the said sentence being extracted and presented to the patron, the said patrone sall be bound to present *ane qualified person* of new to the kirk, within the space of sex monethes thereafter. And gif he failzie to do the same, the said patron sall tine the right of presentation, for that time alanerly: And the right of presentation to be devolved in the hands of the presbytery within the quhilk the benefice lies; to the effect that they *may dispone the same, and give collation thereof*, to sik an *qualified person* as they sall think expedient. Provided always, in case the presbytery *refuses to admit ony qualified minister presented, to them be the patrone*, it sall be *lawfull to the patrone to retaine the haill fruits of the said benefice in his awin handes.*"

Such, then, is what has always been designated "THE CHARACTER OF THE CHURCH OF SCOTLAND." In Scotland the reformation from Popery was no half-measure. There was no edging in on the one hand and keeping back on the other, any portion of

the Popish rights or forms. In principle, in discipline, and in form, the establishment of the Church of Scotland is as clearly defined as any other reformed church in the world. While, on the other hand, in no other country is there, I believe, such distinct evidence of the nature and terms of the compact between the church and the state on which the establishment is founded. It is not left in doubt. It was preceded by a formal conference when proposals were made and agreed to; when proposals were made and rejected, and others substituted in their stead. And, moreover, your Lordships will be pleased to mark the authority and control which the civil power throughout exercised in the matter. By the act of the legislature it is the king who regulates even the time and place of meeting of General Assemblies. No attempt is made to assert that the king is the head of the church; or that there is any other head of the Church of Scotland than our Saviour. But while the General Assembly have certain powers conferred on them, the sovereign is nevertheless entitled so far to overlook their proceedings, as to name their next diet of meeting, and to see that there be no encroachments on the civil rights either of the sovereign or his people. The terms of the statute 1592, may perhaps recall to the recollection of such of your Lordships as have been members of the General Assembly the forms and procedure in use on closing the assembly. The Moderator in the name of our Saviour declares the assembly dissolved, and names the day of next year for another assembly to be held; and then the Lord High Commissioner, in the king's name, *appoints* another assembly to be held, fixing the same day as was mentioned by the Moderator. The Moderator makes no reply, but offers up a prayer, and then the whole members and audience join in singing a verse of the 122d psalm:—

Pray that Jerusalem may have
peace and felicity:
Let them that love thee and thy peace
have still prosperity.

That presbyteries have no power to give collation upon presentations to the presentees except under the authority conferred by the statutes to which I have referred, and that the power which is thereby vested in them, is subject to this condition, that they are bound and astricted to receive qualified presentees, I submit to be a proposition as clearly established as any proposition possibly can be. If presbyteries exercise the power conferred on them by statute, they must also do the duties which are at the same time enjoined. It is they who are to give *collation on presentations*. The power is given to them by the statute, but with the quality that the members of presbytery are themselves to judge

of the qualifications of the presentee. The state reposed in them the power of judging of that matter, but it did not authorise the delegation of the power to others; and, in truth, the presbytery *cannot declare a vacancy* in a parish, if they have not pronounced *a judgment on the qualifications of the person duly presented to them*. The church returned thanks for this charter, and engaged to implement all the duties which it imposed on its judicatories.

Now I would here take leave to ask, if, in the statute and compact, to which I have drawn the attention of your Lordships, there be any trace of a right of absolute dissent, or veto, by the congregation, as a condition of the sufficient exercise of the patron's right? No mention is made of the congregation as a party to the compact. On the contrary, it is clear that the claims preferred on their behalf were rejected. But the defenders lay much stress on the clause in the act 1592, ch. 116, which declares that the statute should “na ways be prejudicial, nor derogate any thing to the privilege that God has given to the *spiritual office-bearers* in the Kirk, concerning heads of religion, matters of heresy, excommunication, *collation or deprivation of ministers*, or any sik like essential censours specially grounded and havand warrand of the word of God.” By the act 1584, ch. 129, the king is declared to be the head of the Church. The act 1592, establishing presbytery, repeals that declaration. The King is not head over the Church of Scotland; and presentations instead of being as in 1567, directed to the superintendents were to be directed to presbyteries, on whom is conferred the power of examination of the qualifications of presentees and giving *collation upon presentations*. But if the presbyteries are entitled to prescribe, as conditions of admission, qualifications which are inconsistent with patronage, then the right is an empty sound. However, neither by the second Book of Discipline nor in the statute 1592, is any such unlimited power given to the church courts, or any right of veto on the part of the people or any portion of them. Accordingly, Sir Henry Moncreiff, than whom no higher authority can be appealed to on the subject, in his account of the Constitution of the Established Church of Scotland, which was published in 1818 as an appendix to his life of Dr. Erskine, and which has been reprinted in a separate form by Lord Moncreiff, says, (p. 57.), “The first Book of Discipline, had indeed placed the election of pastors in the people at large. But when the points not sufficiently digested there, were corrected and new modelled in the second Book of Discipline, the election of pastors is declared to be ‘by the judgment of the *eldership*, (that is of the presbytery,) and the *consent* of the congregation;’ this language signifying, according to all the laws and usage which followed, the right of

“ the people either to give their consent, or to state and substantiate their objections, of which the presbytery were to judge. The people were not the electors, even by this rule; and though it gave more power to the presbyteries than was ever afterwards conceded to them, it gave the people exactly the same place, which the language of the Church, both in early and later times, uniformly assigned to them.”

The statute 1592, c. 116, was repealed by the statute 1612, c. 1, whereby episcopacy was re-established in Scotland. Under the last mentioned statute it is declared, if *The Bishop* shall refuse to admit any qualified minister, that the patron might not only retain the fruits of the benefice, but the Lords of the Privy Council might direct letters of horning to be issued, “ charging the Ordinary to do his duty in the receiving and admitting of sik a person as the said patrone has presented.” And it is maintained on the other side, That as no such compulsitor is given against *presbyteries*, there is therefore *no remedy* competent to a patron and presentee for the illegal rejection of a presentee, except retention of the stipend by the patron under the act 1592, c. 117. But, in the first place, there was no necessity to enact, in express terms, any such compulsitor against *presbyteries*. The conditions of the compact by which presbytery was established, might be enforced without its being necessary, as in the case of Episcopacy, (the establishment of which, in Scotland, was not based on any express compact), to provide the express mode of execution. Accordingly, Lord Bankton says, (B. ii. t. 3. sect. 62,) that, though by our present custom charges on letters of horning are not in use, the patron may, on application to the civil courts, obtain redress with respect to his civil rights whereof they alone are competent to try the validity; “ but as to grounds of refusal on account of insufficiency, heterodoxy, or immorality, the Lords of Session are not Judges, but only the church judicatories, whose right it is declared to be to try the qualities of the person presented, and in that respect their sentence is declared final by our old statute. But as to the civil right, the patron has interest to retain the stipends, or fruits and rents of the benefice in such case; and there must be a remedy to make that right effectual, which can only be by suspending the charge at the instance of the person settled in opposition to his presentee. A qualified person is an ordained minister, or a licensed preacher, who accepts the presentation, and takes the oaths to the government, which must be done within the six months, or otherwise the right devolves to the presbytery.” Mr. Erskine, in like manner says, (b. 1, t. 5, sect. 16,) that though since the statute of queen Anne, letters of horning have not been directed against *presbyteries*, yet the right of presentation is restored to patrons, “ and of course all the consequential

“rights, and, among others, that of retaining the stipend.” And Mr. Dunlop, in his work on *Patronage*, (ch. 8, sect. 283,) adds the observation, that independently of the statute 1592, ch. 117, “and at common law, the patron had always a right to administer the fruits of a benefice while it remained vacant, and the same right has been acknowledged to belong to them, in regard to the stipend of our stipendiary cures.”

I pass over, for the present, the act of the Convention of Estates in 1649, abolishing patronage entirely, and the Directory of the General Assembly of the same year, as to the admission of ministers under the abolition; and passing over also the period while prelacy prevailed, the next statute to which I refer is the act 1690, c. 5, *ratifying the Confession of Faith, and settling the PRESBYTERIAN CHURCH GOVERNMENT*. It expressly ratifies the Presbyterian Church Government and discipline as established by the acts 1567 and 1592, “in the whole heads thereof, *except that part of it relating to patronages, which is hereafter to be taken into consideration.*” And what is remarkable, as evincing the extent of the civil authority still exercised over the Church, this act “appoints the first meeting of the General Assembly of this church, as above established, to be at Edinburgh, the 3d of October next to come, 1690.” Their farther meetings are still regulated by the act 1592. The statute of the same year, 1690, c. 23, was passed, whereby the power of patrons to present ministers was declared void, without prejudice to the rights of all ministers before presented, and to the rights of patrons to vacant stipends; and then it enacts as follows:—“And to the effect, THE CALLING and entering ministers, in all time coming, may be orderly and regularly performed, their Majesties, with the consent of the Estates of Parliament, do statute and declare That in the case of the vacancy of any particular church, and for supplying the same with a minister, the heritors of the said parish, (being Protestants,) and the elders, are to name and propose the person to THE WHOLE CONGREGATION, to be either approved or disapproved by them; and if they disapprove, that the disapprovers give in their reasons, to the effect the affair may be cognosced upon by the PRESBYTERY of the bounds, at whose judgment, and by whose determination, the calling and entry of a particular minister is to be ordered and concluded: And it is hereby enacted, that if application be not made by the eldership and heritors of the paroch to the presbytery, for the call and choice of a minister within the space of six months after the vacancy, that then the presbytery may proceed to provide the said parish, and plant a minister in the church *tanquam jure devolutum.*” The statute then provides, that compensation shall be made to patrons for being deprived of their rights of patronage, and that

the right to teinds not heritably disposed shall belong to them ; but that heritors may oblige them to sell the teinds of their respective lands, at the rate of six years' purchase, as the same shall be valued by the commission.

It will not, I presume, be alleged by the defenders, that the act 1690 was intended by the framers of it as a *limitation* of the rights of the Christian people ; or that the church was thereby authorized to delegate their power of judging of the qualifications of nominees—a power of which they had ever been most tenacious, conceiving that it was handed down to them direct from the Great Head of the church through the apostles. While the statute transferred the right of appointing ministers from patrons to the heritors and kirk session of a parish, it, in the most anxious manner, reserved entire the power and proper duty of the church courts of judging of the validity of objections to nominees. And so far from there being, from beginning to end of the statute, one sentence calculated to convey the idea that a bare *majority*, or any section of the congregation, could, without assigning and establishing reasons, absolutely *veto* the nomination—the whole spirit, as well as words of the act, exclude the doctrine. The people had neither a share in the initiative nor a *veto* upon it. And it is not unimportant to observe that, though in the act 1690, the word “ calling ” is substituted for “ presenting,” as used in the former statutes, and the power is transferred from patrons to the session and heritors—what is done is in substance the same. Under the former laws a patron presented the individual to the presbytery. Under the act 1690, the heritors and elders “ call or choose ” him, and then present him to the whole congregation, to be either approved or disapproved by them. But their dissent or disapproval is only *on cause shewn*. The presbytery are constituted judges of the validity of the reasons assigned, and their judgment was subject to the review of the superior church judicatories, who were to cognosce and judge of the matter, as the courts on whom by law the obligation to that effect was imposed. Your Lordships must, I think, have observed, while I read the act 1690, that the objection of *one* man, if valid and substantiated, was just as effectual to exclude the nominee, as if the *whole congregation objected*. And does not even this statute, which was meant to *extend* the rights of the congregation, as well as the other statutes by which it was preceded, show that the legislature was entitled to statute and declare, and regulate the mode of *admission of ministers to benefices*, and the grounds which should be held valid by the proper tribunal to prevent their admission ? And what was *the practice* under the law of 1690 ? Can the defenders point out a single instance under that law, of a presentee being rejected before trial of his qualifications by the Presbytery of the bounds, in respect of the *veto* of a majority

or any other section of the congregation? They will, I believe, search the records of the church courts in vain for any case of the kind. There could be no such practice if the terms of the statute were regarded. The interim law of the Church speaks of a majority of *male heads of families*, excluding thereby from the right it proposed to confer, all the female heads of families and others composing the congregation. The act 1690, on the other hand, required the person "called" by the Session and heritors to be presented to "*the whole congregation*;" so that instead of extending the privileges of the Christian people, the late interim-act of Assembly is in effect a limitation of them in one particular, though an infringement of the rights of patrons, and of the highest duty of the Church, the duty of collation.

As to the practice under the act 1690, I again refer to SIR HENRY MONCREIFF'S Work, who, after referring to the Directory 1649, says page 35,—“These circumstances are adverted to, “because they go a great way to explain the provisions of the “act 1690.” “It was not thought expedient to give the clergy the “influence which, in whatever form it was exercised, they really “possessed before the usurpation of Cromwell, and *still less* to “place *any power* in the great body of the people, which could “interfere with the right of election. King William’s advisers “followed a middle course, between these extremes. Though their “arrangement was certainly suggested by the former practice, it “was in a great measure free from its chief disadvantages. In place “of the Presbytery, it gave the original and exclusive power of “nomination to the heritors and elders of the parish. The person nominated, was then indeed to be proposed to the congregation, who might approve, or *disapprove for reasons shown and “substantiated*; BUT WHO HAD NO POWER OF REJECTION WITHOUT “SUBSTANTIATING REASONS, which the Presbytery, and (*on appeal*) the Superior Courts, were to pronounce sufficient,” at whose judgment the cause was to be ordered and concluded.—It is an ascertained fact, that King William foresaw the effects likely to result, even from the statute 1690, c. 23, which was passed by his Commissioner against his desire. And King William’s apprehensions on the subject were soon realized; for instead of using the concessions made to them with temper and moderation, the clergy so disgusted him by the turbulence and intolerance of their proceedings, that his commissioner, according to the author of the Life of Principal Carstairs, (p. 50.) suddenly dissolved the General Assembly in 1692, and it was with no small difficulty that the king was prevailed upon to countenance its meeting for the future.

In the order of time, the “Act of Settlement,” as it is usually termed, (1693, c. 22,) is next to be referred to. *It ratifies the*

Confession of Faith and the Presbyterian Church Government. And for the more effectual setting the quiet and peace of the Church, an address to their Majesties is proposed, to the effect that all the present ministers possessing churches, but not yet admitted to the exercise of the church government, shall qualify themselves by subscribing the assurance and formula attached to the Confession of Faith, certifying such as shall not qualify themselves within thirty days, that they may be deposed *tam ab officio quam a beneficio*. But further declaring, that any who have not been received into the government of the Church, but shall offer to qualify themselves, shall have their Majesties' protection, ay and until they may be admitted and received. But the benefit of the act is declared not to extend "to such of the said ministers as are scandalous, erroneous, negligent or insufficient, and "against whom, the same shall be verified within the space of "thirty days after the said application; but these, and all others "in like manner guilty, are hereby declared to be lyable and subject to the power and censure of the Church as accords."

From these enactments, I submit, it is clear, that the qualifications necessary to entitle a person *to be admitted to, or to continue in the office of the ministry*, were in their nature *personal*, and such as could be dealt with by the legislature as well as by the church courts. Your Lordships can judge of the requisites of a presentation, and of the time when lodged, or of the effect of a church court sustaining it in favour of a qualified presentee. This you have often done. And in the recent case of the Duke of Gordon v. Gillon, 7th June 1825. 1 Wilson & Shaw, p. 295, your Lordships (and the House of Lords affirmed the judgment,) found that a presentee *whose presentation had been sustained* by the Presbytery, THOUGH HE HAD NOT BEEN INDUCTED, and not The Moderator of the presbytery, was the *proper party* to be called in a process of approbation of a decret of valuation by the sub-commissioners. Though you cannot touch the spiritual act of *ordination*, you can judge of the admission of ministers to any civil effect. But the reason for the pursuers particularly referring to this statute, is to show that it contains no authority for holding the assent of a majority of the congregation as a necessary qualification of a presentee to a living, or their dissent an absolute disqualification. It was the statute 1693 which enacted, "That all "schoolmasters, and teachers of youth in schools, are, and shall "be lyable to the trial, judgment, and censure of the presbyteries "of the bounds, for their sufficiency, *qualifications*, and deportment in the said office." The duty thus devolved on presbyteries of trying and judging of the qualifications of the teachers of youth, they have not attempted to devolve upon others, or to require as a test, before judging themselves of the qualifications

of teachers, that they shall not have been *veto'd* by a majority of the male heads of families in the parish. In judging of the qualifications of schoolmasters, the presbytery act as an ecclesiastical court; and, by the judgment of the House of Lords altering the judgment of this court, in the celebrated case of *Bothwell (Mc Culloch v. Allen, November 1793,*) their judgments were declared subject to review by the *superior church* judicatories. That state of the law was, however, altered by the act of 1803, which declares the judgment or determination of the presbytery, "As to the qualifications of such presentee, shall not be reviewed or suspended by any court, civil or ecclesiastical."

The opinion of the Church as to its own powers, and the rights vested in congregations, while the statute 1690, c. 23, continued in operation, may be gathered from an overture concerning the "planting of vacant churches, especially *tanquam jure devoluto*," which was transmitted by the General Assembly to presbyteries in the year 1711. After pointing out the mode of nominating a minister, the overture proceeds thus:—"But if any of the heritors, elders, or heads of families, or persons of good reputation in the parish do compear before the presbytery, and offer SUFFICIENT OBJECTIONS against the person to be settled, as to his orthodoxy, literature, life and conversation, or other ministerial qualification, the presbytery, before they proceed to the settlement, shall take trial of said objections. But because some person from a litigious or disaffected humour, do oppose the settlement of a vacant church with a fit and qualified person, and do appeal with a design to continue the vacancy for some time longer; therefore, to prevent this, it should be declared, that unless those who do oppose the planting of any vacant parish, do *timeously give in, in writing under their hands, SUFFICIENT OBJECTIONS against the person designed to be settled, and offer to prove the same in due time*, and give in also the reasons of their appeal within ten days thereafter, in manner appointed by the acts of the General Assembly; (that is, even supposing the sentence to be against the people, they required the reasons should be stated,) the same shall not be regarded, nor the appeal received without it; but the settlement shall go on as if the appeal had never been made." Such was the declared opinion of the General Assembly in 1711, as to the rights of the parishioners in relation to the planting of ministers in vacant churches. The overture was transmitted to presbyteries, not because of there being any doubt on the subject now adverted to, but because it contemplated certain alterations on the settlement of churches *jure devoluto*. In the meantime the assembly appointed the rules and directions to be strictly observed.

The law of the church was therefore *declared* to be, that objectors behoved to bring forward and *substantiate sufficient objections*, thereby giving effect, in express terms to the enactment of the Legislature. That part of the overture which related to the *jus devolutum* did not pass into a law in consequence of the statute of Queen Anne, which was passed in the following year, by which ample provision was made on the subject.

The act 1690, c. 23, was repealed by the statute 1711, c. 12, which proceeds on the preamble, that by the ancient laws and constitution of Scotland, the presenting of ministers to vacant churches, did of right belong to patrons, until by the act 1690, c. 23, it was taken from them and given to the heritors and elders of the respective parishes; "And whereas, that way of calling
 " ministers has proved *inconvenient*, and has not only occasioned
 " great heats and divisions among those who, by the aforesaid act,
 " were entitled and authorized to call ministers, but likewise has
 " been a great hardship upon the patrons, whose predecessors had
 " founded and endowed those churches, and who have not received payment or satisfaction for their right of patronage from the
 " aforesaid heritors or liferenters of the respective parishes, nor
 " have granted renunciation of their said rights on that account;" be it therefore enacted, "That the aforesaid act
 " made in the year 1690, intituled, *Act concerning Patronages*,
 " in so far as the same relates to the presentation of ministers by
 " heritors, and others therein mentioned, be, and is hereby repealed and made void; and that the aforesaid fifteenth act of the
 " fifth session, and thirteenth act of the sixth session of the first
 " Parliament of King William, be, and are hereby likewise repealed and made void; and that, in all time coming, the right
 " of all and every patron or patrons to the presentation of
 " ministers to churches and benefices, and the disposing of the
 " vacant stipends for pious uses within the parish, be restored,
 " settled, and confirmed to them, the aforesaid acts, or any other
 " act, statute, or custom, to the contrary, in any wise notwithstanding; and that, from and after the first day of May 1712,
 " it shall and may be lawful for her Majesty, her heirs and successors, and for every other person, or persons, who have right
 " to any patronage, or patronages of any church, or churches whatsoever in that part of Great Britain called Scotland, (and who
 " have not made and subscribed a formal renunciation thereof
 " under their hands,) to present a qualified minister or ministers
 " to any church or churches whereof they are patrons, which shall,
 " after the said first day of May, happen to be vacant; and the
 " Presbytery of the respective bounds shall, and is hereby obliged to
 " receive and admit in the same manner, such qualified person or

“ persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act ought to have been admitted.

By section 3d, it is enacted “ that in case the patron of any church aforesaid, shall neglect or refuse to present *any qualified minister* to such church that shall be vacant the said first day of *May*, or shall happen to be vacant at any time thereafter, for the space of six months, after the said first day of *May*, or after such vacancy shall happen, that the right of presentation shall accrue and belong for that time to the presbytery of the bounds where such church is, who are to present a *qualified person* for that vacancy *tanquam jure devoluti*.

And by section 5 it is declared, “ that nothing in this present act contained, shall extend, or be construed to extend, to repeal and make void the aforesaid twenty-third act of the second session of the first Parliament of the late King William and Queen Mary, excepting so far as relates to the *calling and presenting of ministers, and to the disposing of vacant stipends, in prejudice of the patrons only.*”

This is the leading subsisting enactment on the subject of church patronage. As I understand it, that part of the act 1690, c. 23, whereby patronage was annulled is repealed; while the other parts of it, by which patrons acquired right to teinds not heritably disposed, and heritors could compel patrons to sell the teinds of their respective lands to them at six years' purchase, remain in force. But a question has been stirred, as to the extent to which the act 1711 repealed the act 1690. On the one hand it has been argued, that the act of 1711 placed matters on the footing in which they stood under the act 1592, whereby presbyteries are bound and astricted to receive qualified persons presented by lawful patrons, and consequently bound themselves to judge and pass sentence on their qualifications—On the other hand it has been argued that the act of Queen Anne only repealed the act 1690, in so far as regarded *the right of presentation*, while that part of it which recognised *the right of the congregation to approve or disapprove* of the individual called and chosen remains untouched, and that the restricting clause in 1592 was now no part of the Law. The latter construction of the act 1711 is, however, neither consistent with its tenor nor spirit. So much of the act 1690 was repealed as related to the calling of ministers, with a declaration, that in all time coming *the rights* of patrons to the presentation of ministers to churches and benefices, and the disposing of vacant stipends, are restored, settled, and confirmed to them, the aforesaid acts of 1690, or any other acts, statutes, or customs, to the contrary in anywise notwithstanding. These words are sufficiently comprehensive. But they are not all the

words in the act that bear on this question ; for the clause *obliging* the presbytery to admit and receive *qualified presentees*, is coupled with this direction,—“that such presentees shall be admitted and received in the same manner” “as the persons or ministers *presented* before the making of this act ought to have been admitted.” The words, “in the same manner” as persons or ministers were “*presented*,” assume the act 1690 to be wholly out of the field, in so far as regards the “calling and entering” of ministers. For they were not presented at all under that act, and hence the word “presented,” when used in the act of Queen Anne, refers back to the rights of patrons under the acts 1592. Accordingly, Lord Bankton says, (b. 2. t. 8. sect. 68,) after quoting the words above referred to in the act of Queen Anne,—“Now, by the act 1690, the person named, or presented “by the heritors and elders, behoved to be proposed to the congregation, to be approved or disapproved by them ; and if they “disapproved, the presbytery were to cognosce and determine “therein. It may therefore be doubted, whether that method “must still be followed. I conceive *neither people nor presbytery “can obstruct the settlement*, except upon objections to the presentee’s life or doctrine, and that the method in the act 1690 is “not now the rule. The manner mentioned in the British statute “must be *that which took place formerly*, when patrons had the “right of presentation, they being restored to their ancient right ; “and if it were otherwise, the presbytery would have it in their “power to set aside the presentation upon suggestions from the “people, which was not intended ; nor did such method take “place when the patrons presented in the purest times of presbytery.” But really the question is of no great importance to the judicial determination of this cause. For if the act 1690 be not repealed to the extent to which I understand it has been, then it remains coupled with the restoration of all the ancient rights of patrons. Furthermore, even supposing the astringing clause of the act 1592 was not expressly revived, the act of Queen Anne itself contains an equally effectual astringing of the presbytery to try and judge of the qualifications of presentees. It, in express terms, obliges the presbytery to receive and admit such qualified persons as are presented to them by patrons. And it has been shewn, both from the words of the act 1690, c. 23, itself, as well as from the practice under it, as attested by Sir Henry Moncreiff, that all the right belonging to the congregation under that law was, that they might approve or disapprove, *for reasons shewn and substantiated*, but that they had no power of rejection without substantiating reasons, of the sufficiency of which the presbytery, and on appeal, the superior church courts, were to judge.

I shall close my review of the statutes by referring to a clause

in the statute 1719, c. 29, which was passed in order to remedy an evil that had prevailed to a considerable extent; viz. the right, or supposed right, to *compel* a person to enter into the church, or to move against his inclination from one charge to another. While I read the clause, your Lordships will be pleased to mark the reference which it makes to ministers *qualified* according to law, always pointing out, that the matter of qualification is something which is personal to the presentee, which he either has in respect of his acquirements and stamp as a licentiate, or something which he requires to do or perform,—the matter of qualification, whether it consist in something possessed by him, or which he is to do, being capable of being known to the patron and *judged* of by the presbytery as a court. “Whereas great obstructions have been made to the planting, supplying, or filling up of vacant churches in Scotland with ministers *qualified according to law*; patrons presenting persons to churches who are *not qualified*, by taking the oaths appointed by law, or who, being settled in other churches, cannot, or will not, accept of such presentations: Be it enacted, that if any patron shall present any person to a vacant church who shall not be qualified, by taking and subscribing the said oath, in manner aforesaid, or shall present a person to any vacancy, who is then, or shall be, pastor or minister of any other church or parish; or any person who *shall not accept* or declare his willingness to accept, of the presentation and charge to which he is presented, within the said time, such presentation shall not be accounted any interruption of the course of time allowed to the patron for presenting; but the *jus devolutum* shall take place as if no such presentation had been offered; any law or custom to the contrary notwithstanding: That nothing herein contained shall prejudice or diminish the right of the Church, as the same now stands by law established, as to the trying of the qualities of any person presented to any church or benefice.”

Thus I have brought under the review of your Lordships the several statutes on which the pursuers found, and it is according to their import and legal effect, that the present case falls to be decided. Other considerations have been pressed into the discussion by the defenders, many of which, I humbly venture to think, have very little, or rather no relevancy to the inquiry. Still it is my duty to notice them. But before doing so, I would take leave to ask, if, in any portion of the acts of Parliament to which the attention of your Lordships has been drawn, there is the vestige of authority for maintaining, that the civil rights of a patron may legally be qualified by the veto of the congregation, or that the test of qualification of a presentee shall be the absence of that veto? Is there any indication of such a

negative act of qualification? On the contrary, the presbytery are bound and astricted to receive a qualified presentee; and to entitle them to reject him, and declare the parish again vacant, they must by their sentence, which is reviewable, find him *not qualified*.

It is however argued on the other side, that the proceedings of the presbytery of Auchterarder, of which the pursuers complain, were in their nature spiritual; that the presbytery were engaged in the process of moderating in a call to Mr. Young; and that they only judged of the sufficiency of the call to him, which was an essential but spiritual step towards the completion of the pastoral relation. Now, my *first* observation on this part of the defenders' case, is with reference to the state of the fact. I say that no judgment either sustaining or rejecting the call has even yet been pronounced by the presbytery. Your Lordships will recollect, that I read from the minutes of the 16th of December 1834, that it was moved, "That the presbytery do take into consideration the call to Mr. Young, presentee to Auchterarder; and do find, that it being signed only by three individuals, and of these only two members of the congregation, that the said call is not a good or sufficient call, and do declare that no settlement can take place thereupon." The motion was duly seconded, and put, but rejected; and at no after stage of the proceedings was any judgment pronounced upon the call. In the *second* place, it will be recollected, that the admitted ground of rejection of Mr. Young, "the presentee to Auchterarder, so far as regards the particular presentation, and the occasion of this "vacancy in the parish," was the arbitrary dissent of a majority of the male heads of the families. In other words, a quality was introduced into the process for settling Mr. Young under the Earl of Kinnoull's presentation, precedent either to the call or the examination of his qualifications for the pastoral office. In the *third* place, I wholly deny that the church has the power, under the pretence of defining what a call means or does not mean, to adject a quality of this nature to the exercise of the patron's right—or to interpose any barrier betwixt a presentee—the deed of presentation in whose favour has been sustained—and the judicature appointed by law to try and judge of his qualifications for the ministerial office. In the *fourth* place, as the defenders claim for the church, the right to interpose the barrier of which the pursuers complain, and to prescribe any condition which she chooses, as requisite in conferring the pastoral relation—and as they farther allege that the right is supported by the usage of the church—the onus lies with them to satisfy your Lordships on both these points. But I do not hesitate to meet them on both grounds.

And first, as to the practice of the church, the defenders in their pleading say, (p. 6) "This matter of determining on the validity or sufficiency of the call, is necessarily a matter of purely ecclesiastical jurisdiction, which the church courts have invariably and exclusively exercised; although it is not disputed, that in determining what constituted a sufficient or valid call, they have at different times followed different lines of decision. At one period, and indeed for a considerable number of years after the restoration of patronage by the Act of Queen Anne, *no one was settled, whose call was not subscribed by a majority of the members of the congregation taking part in the matter.* It is material to observe this. It is altogether unquestionable, and will not be denied on the other side. Such was once undoubtedly the law and practice of the church. But gradually, the church courts, in their decisions in particular causes, came to disregard a deficiency of signatures, and to sustain calls which were very inadequately subscribed. Latterly, they even disregarded the declared dissent of a majority of the people, although there can be no doubt whatever, that when *a majority dissented*, it afforded the most conclusive evidence that the presentee *had not been called by the majority*, which had previously been deemed necessary for the constitution of a valid call. They still, however, occasionally exercised their undoubted power of refusing to sustain a call, and rejecting a presentee. One remarkable instance of this occurred in 1740, in the case of the Rev. Mr. Mercer, presentee to the parish of Currie."

This statement however is not consistent with the fact, as your Lordships will see from the authority to which I am to refer. Before doing so, however, allow me to mention, that having had occasion to look into the cases in regard to the settlement of ministers after the year 1711, with a view to the evidence which I gave before the Select Committee of the House of Commons on the subject of church patronage, I found that settlements were not generally made by means of *presentations* for nearly forty years after the passing the Act of Queen Anne. They were effected on the principle of the Act 1690, according to which it will be remembered that the initiative, or *form of nomination*, was by means of "A CALL." And it is from the use of that phrase under that statute, that a good deal of the misapprehension which prevails has arisen. So late as 1747, there were eleven cases of competing calls before the General Assembly on printed papers. But the usage which is alleged by the defenders to have obtained for a considerable number of years after the restoration of patronage—that no one was settled *upon a presentation* whose call was not subscribed by a majority of the members of the congre-

gation taking part in the matter—is altogether inconsistent with what is said by Sir Henry Moncreiff, and I believe by every one else who has duly attended to the history and proceedings of the church during that period. At page 41 Sir Henry says,

“The act 1712 came upon them suddenly at last; but its immediate consequences were neither as visible nor as extensive, as either its friends or its opponents have since affirmed, or had then predicted. *The settlement of ministers by presentations, was at first but in few instances resorted to; and in the examples which occurred, the presentees were personally so acceptable to the parishioners, as to disarm any opposition which might have been made to them.* In many cases in which presentations were lodged with the presbyteries, the church courts effectuated the settlements without much regard to them—the sentences of the synods and assemblies proceeding more on the calls than on the presentations, even when both were before them.” Again, at page 43, he says, “It has been already observed, *that for many years after the date of the act restoring patronages, presentations were by no means introduced into general practice.* There were, notwithstanding, several abuses of the right of patronage, which very early created serious disorders.”

Besides their general averment as to the practice, the defenders have referred to a single precedent—the case of the rejection, in 1740, of Mr. Mercer, the presentee to the parish of Currie—a very remarkable instance, indeed, when the facts are attended to. Mr. Mercer was minister of Aberdalgie. It was he who moved censure on the celebrated Ebenezer Erskine's sermon in the Synod of Perth, and in consequence, he was everywhere most unpopular. In 1735, he obtained a presentation to the parish of Dron; but the General Assembly refused to sanction his translation. In 1740, he received a presentation to the parish of Currie, the particulars in relation to which are thus stated by Sir Henry Moncreiff. After observing that the act of Assembly 1736, to which I have hereafter to refer, seems to have had some effect in a few processes of settlement, he says, p. 62:—

“The most remarkable example occurred in the case of the parish of Currie, in the presbytery of Edinburgh. In 1740, the Assembly refused to proceed to the settlement of Mr. Mercer, *then minister of Aberdalgie*, as presentee to the parish of Currie, though he had been regularly presented by the magistrates and town-council of Edinburgh, the undoubted patrons. They set him aside, avowedly on account of ‘*the difficulties which attended his call,*’ that is, on account of the general opposition made to him in the parish. They went farther, and followed up their decision, by recommending it to the magistrates of Edinburgh,

“ to offer to the parish of Currie a lect of six candidates, and of
 “ them to present the individual who should be selected by the
 “ majority of *heritors and elders*. It appears that this advice was
 “ followed. Mr. Mercer was no more mentioned, and a minister,
 “ acceptable to the parish, was afterwards inducted. *This was a*
 “ *remarkable decision, very unlike the proceedings of Assemblies*
 “ *since 1730*; and it furnishes a striking example, in which the
 “ Assembly set aside a presentee, to whose life or doctrine no ob-
 “ jection whatever could be stated; in which the personal views
 “ or interests of the presentee were not at all consulted; and in
 “ which the patrons made no attempt whatever to retain the fruits
 “ of the benefice; though their presentee was not only not inducted
 “ by the church courts, but was, without any literary or moral dis-
 “ qualification, expressly rejected.” And in a note, Sir Henry adds,
 —“ To those who are acquainted with the history of the time,
 “ this decision will appear to have been, *in a considerable degree,*
 “ *influenced by the state of the country,* and by the secession from
 “ the church, which was just then openly avowed. Mr. Mercer
 “ was the person who had first moved a censure on Ebenezer
 “ Erskine’s sermon in the Synod of Perth; and the consequences
 “ of that measure were always connected with his name. He was
 “ in the highest degree *obnoxious*, from that circumstance, to every
 “ order of the people; and the sentence of the Assembly was
 “ most gratifying to those, who either countenanced or deprecated
 “ the secession; *though it was certainly at variance with many de-*
 “ *cisions, in cases as difficult from their own merits, both before this*
 “ *time and afterwards.* In 1735, Mr. Mercer’s translation to the
 “ parish of Dron, in the presbytery of Perth, had been in like
 “ manner *refused by the Assembly.*”

In addition to these observations, I may add, 1st, that
 Mr. Mercer, as your Lordships will see, on referring to the
 proceedings of the General Assembly, was present, and ac-
 quiesced in its deliverance; and he behaved to do so for the
 reason, 2dly, that when he received the presentation to the
 parish of Currie, he was *minister of the parish of Aberdalgie* in
 Perthshire. Now there is this difference between a presentation
 to a licentiate and to an ordained minister having the cure of souls,
 that in the latter case, according to the law of the church, the
 sanction of the church courts is necessary to his translation. It
 was their province to judge whether his translation was or was not
 for the greater good of the church; and as they found that it was
 not, they refused to loose the pastoral relation which already sub-
 sisted betwixt him and his people, thereby obliging him to remain
 in the parish of Aberdalgie, in which he was settled. The single
 case, the settlement of the parish of Currie, therefore, is any thing

but an authority in support of the right which the defenders claim for the church ; and certainly one, or even a dozen such cases occurring in the course of a century, can never instruct the exercise of the alleged right. Besides, it is notorious, if the practice for the last century were appealed to, that, in the words of Sir H. Moncreiff, (p. 64,) “ the induction of ministers, *where the resistance of the* people was both violent and general, was frequently sanctioned by the same Assemblies ; though the language of their decisions “ was commonly guarded and temperate.”

Thursday, 23d November.

MR. WHIGHAM,—I believe that a good deal of confusion prevails, as to the true import of the term “ CALL,” by not attending to some material facts in the history of the church. By the act of the Convention of Estates in 1649, which repealed all the laws on the subject of patronage, it was ordained, that ministers should only be admitted to the ministry in parishes, “ on the suit and “ *calling* of the congregation.” And the form in which the congregation proceeded in their choice or election, was by what was termed A CALL to a particular person to become their minister. In like manner, when under the act 1690, chap. 23, “ the *calling* and choosing of ministers” was vested in the *heritors and kirk session*, the same form of “ A call” was used, as the initiative step in the process of settling a minister in the parish. The following is the form of a call under the act 1690, as given by *Stewart of Pardovan*, in his “ Collections and Observations concerning the Discipline, &c. of the Church of Scotland,” p. 4. “ We the heritors, elders, and magistrates of the town-council “ of being destitute of a fixed pastor, and being most “ assured by good information, and our own experience, of the “ ministerial abilities, piety, literature, and prudence, as also of “ the suitableness to our capacities of the gifts of you, Mr. A B, “ preacher of the gospel, or minister at C, have agreed, with the “ advice and consent of the parishioners foresaid, and concurrence “ of the Rev. Presbytery of D, to invite, call, and intreat : like- “ as, We, by these presents, do heartily invite, call, and intreat “ you, to undertake the office of a pastor among us, and the “ charge of our souls. And further, upon your accepting of this “ our call, promise you all dutiful respect, encouragement, and “ obedience in the Lord. In witness hereof, I —”

It seems, however, to be imagined, that not only the form and term “ CALL,” but that the *substance* of the thing is the same now, when patronage is again a part of the law, as it was when patronage was abolished, and the right of *calling* or of election of ministers was either in the congregation, as under the statute 1469, or in the heritors

and session under the act 1690, when the form of election was by a writing termed a call; an idea which may have arisen from the use of the term "calling ministers," in both of these statutes. But this is a mistake, and the defenders have fallen into it, when they cite as of authority that part of the Second Book of Discipline which was rejected under the compact concluded by the statute 1592, c. 116. For it will always be kept in mind, that the Book of Discipline is to be read as of the authority of law, even of the established church, in so far only as it was sanctioned by the state, and no farther. But besides, even though the Second Book of Discipline were, in all respects, to be held as the law of the subject—what is the right which it conferred on the congregation? *Sir H. Moncreiff*, in the passage which I read yesterday, says, (p. 57,) it gave (the congregation) the right "either to give *their consent*, or to state *and substantiate their objections*, of which the presbytery were to judge." "It gave the people exactly the same place which the language of the church, both in early and later times, *uniformly assigned to them*." The people were allowed an opportunity of expressing *their consent* if they chose; but if they did not choose to give their consent to the appointment, their withholding it *formed no bar to the presbytery's proceeding in the trial and final settlement of the presentee*. On the other hand, if the people, or any of them, *dissented*, they behaved to substantiate their reasons.

In none of the statutes from 1567 to 1711, are the congregations mentioned, excepting in 1649, and in the act 1690, when they are expressly required either to *approve* or *disapprove* of the person called by the heritors and elders. If they approve, the settlement proceeds; if they *disapprove*, the *disapprovers* are to give in their reasons to the presbytery, to be by them judged of and determined. The form in which the approval was expressed was by concurring in the *call* of the heritors and elders. But without the approval the call was made effectual. To stop it, there behoved to be *disapproval* on reasons substantiated. It was in this way that the interests of the congregation were cared for and attended to.

Now mark the form of procedure under the act 1592, and again under the subsisting law of 1711. The patron presents a qualified person, that is to say, either an ordained minister or a licentiate of the church. That is his obligation. The members of the congregation may give their consent that the presentee shall take spiritual oversight of them; and for that purpose, the old form of the call is used as the means of receiving such consent. It still runs in the name of the heritors, elders, heads of families, and other inhabitants of the parish, all of whom, without reference to their being of the one class or the other, may concur in testify-

ing their consent that the presentee shall be their pastor. That is the use of the call. It has none of the qualities or substance of the call, which was the initiative step when the appointment was in the congregation, or in the heritors and elders. But if, again, the people do not consent expressly, their consent is implied; and if they dissent their dissent must not be arbitrary, but on cause. This has been the invariable usage of the church, according to all the laws which either preceded or followed the Second Book of Discipline. Excepting under the statute 1649, the congregation never were the callers of the presentee. That statute placed the initiating with them, and of course a veto upon their own call would have been an absurdity.

Again when under the law of 1690, the heritors and elders were the callers, the congregation might either approve, that is, consent to the call; or disapprove, that is, dissent from the call, but the reasons for it behoved to be substantiated before the presbytery and church courts in succession. If the causes shown for the dissent were groundless, then the church court proceeded to complete the pastoral relation, by giving collation on the presentation, and ordaining the presentee to the spiritual office. Collation to the benefice now proceeds, under the authority of the acts of parliament, on the patron's deed of presentation. The act of ordination of the presentee as a minister of the church is the proper spiritual act. It is never performed but once, though the minister may be translated from one benefice to another twenty times over. As often as he is presented to another living, the form of a deed of presentation, and collation upon it to the benefice, are required. But ordination by the brethren being in its nature indissoluble, except when a party ordained is proceeded against by the church for the higher offences, to the effect of deprivation, is not again requisite.

Among the differences between the two great parties by whom the Church of Scotland was divided, from the period when patronage was restored in 1711 until the year 1782, a veto, or arbitrary dissent by the members of a vacant congregation to a presentee was unheard of. The main ground of difference was this: The party commonly termed the Moderate party always admitted, that the members of the congregation, or any of them, might, at any stage of the proceedings, object to the settlement of the presentee among them. But they maintained, that their objections behoved to be of such a nature as to require that the presentee should be proceeded against by a libel; and that it was only *on the occasion of the return of the edict*, after the presentee had been tried by the presbytery and found qualified, that the congregation were entitled to state objections to his life and doctrine, which they behoved instantly to verify. On the other hand, the party who

were commonly designated the Popular party, maintained, that the members of the congregation might, on the occasion of moderating in the call to the presentee,—that is to say, when an opportunity was given to them to consent to his settlement,—disapprove of him, and, at the same time, substantiate their objections before the presbytery.

These were the grounds of difference between the two parties. The Moderates admitted the right of the people to object to the life and doctrine of the presentee, on the occasion of the return of the edict. The Popular party again, contended for the people's right to object, but upon cause shown, to the presentee at the moderating in the call in his favour, and consequently, before the presbytery had any opportunity of pronouncing sentence upon his qualifications. But the Popular party never contended, that the members of the congregation were entitled arbitrarily to dissent from the settlement, or that such arbitrary dissent should be of conclusive effect in rejecting the presentee. That matter formed no controversy between the great parties in the church. The grounds of difference between them is thus stated by Sir H. Moncreiff at page 82:—"In 1725, and afterwards, they who called themselves *the moderate party* had to contend, not only with the people, but with what was then no small proportion of the clergy, those who extended their ideas of calls to the whole body of parishioners; many of whom went so far as to place the claims of the people on the *jus divinum*. But this description of the clergy had been gradually dying out, and was now no longer considerable. The *opponents* of Dr. Robertson professed to contend for nothing more, than what they who now call themselves *the moderate party* had before asserted,—*the necessity of a call from the heritors and elders, as the foundation of the pastoral relation*. Both parties professed to reserve to the people their *right to object on cause shown*. But Dr. Robertson and his friends professed to *confine* the right of objection to the return of the edict, and then to limit it to objections to the life or doctrine of the presentee; while the others maintained that the people had a right to offer *their objections to the call, for the judgment of the presbytery, at the time when the merits of the call were to be decided on*.

"The old forms of proceeding, notwithstanding this difference of opinion, were still adhered to; and no settlement was effected till an attempt was made to procure a call. In difficult cases any of the parishioners were admitted to subscribe the call, as well as the heritors and elders; and though Dr. Robertson was extremely cautious, in departing from the ancient technical language which had been in use in the sentences of the General Assembly, he came gradually to introduce the term *concurrence*

“in place of the term *call*. Of this innovation there is perhaps “not more than one example in Dr. Cumin’s time, and that occurs “in a case in which, though the Assembly sustained both the “presentation and the *concurrence*, they notwithstanding set aside “the presentee, and applied to the patron to present another, “which he afterwards did.

“It was Dr Robertson’s policy, that in effecting settlements, “even the most difficult, by presentations, the *old forms* in other “points should be always observed, as they still are. But the “principle was ultimately avowed and adhered to, that a presentation to a benefice was in all cases to be made effectual, *independent of the merits of the call or concurrence*. Cases, as has “been already stated, have sometimes occurred, in which presentees have been set aside; but this can scarcely be shown to “have happened in Dr. Robertson’s management, merely from “defects in the concurrence of the parish. The general doctrine, “that a presentation, adhered to by the presentee, should in all “cases be made effectual, without *any reservation founded on the “merits of the call*, or on the number of heritors, elders, or parishioners who concurred or dissented, was uniformly maintained “during the whole period of Dr. Robertson’s influence in the “General Assemblies.”

This statement of the grounds of difference between the parties is clear and explicit, as all Sir H. Moncreiff’s statements are. And, with all his known partialities for the Popular party, and the doctrines they maintained, there is not the least ground for holding, that he understood that party to contend that, according to the constitution of the Church of Scotland, there was recognised a right in any portion of the congregation arbitrarily to dissent from the presentee’s settlement in the parish.

And this leads me to point out to your Lordships, the form of procedure which is in use to be followed upon the settlement of a minister. By attending to it, you will the more readily see the full effect of Sir Henry Moncreiff’s remarks; and how far provision has been made, even under the law with patronage as a part of it, for the interests of the congregation, by allowing them to consent to the settlement if they choose, or to object thereto, substantiating at the same time the grounds of their objection. I read now from *Dr. Hill of Dailly’s* work, entitled, “The Practice of the several Judicatories of the Church of Scotland.” He says, at page 56, “A presentation must be in favour of a licentiate of this “church, who also qualifies to government, and who is willing to “accept of the presentation. Hence there must likewise be laid “on the presbytery’s table, a letter of acceptance from the presentee, an extract of his having qualified to government, and,

“ if he is not already an ordained minister in the occupation of another charge, an extract of his licence to preach the gospel.

“ It is not competent for the heritors of a parish to object to a presentation. The presbytery are the judges whether it is to be sustained ; and unless they find the presentee disqualified, they are ‘ bound and astricted ’ to receive him on the presentation of an undoubted patron.

“ The presentee, if a probationer, is appointed to preach in the vacant parish, on one or more Sundays, according to the practice of the presbytery ; and a day is fixed, posterior to his preaching, on which a call to him from that parish is to be moderated in. Notice of this is directed to be given from the pulpit of the vacant parish, by a member of presbytery, at least ten free days before the meeting for moderating in the call takes place.

“ At that meeting a sermon is preached by the member of presbytery who is appointed to preside ; the people are informed at the conclusion of public worship, of the presentation that has been lodged ; and they are invited to subscribe a written call to the presentee to be their minister, and to *encourage him by expressing their willingness* to receive him in that capacity. The signatures of those who do so are attested as genuine by the ministers present, and the subscribed call is given in by them to the next meeting of presbytery.

“ The meeting for moderating in a call being usually, not an ordinary meeting of presbytery, but altogether *in hunc effectum*, it is not competent at it to receive objections to the presentee, although they are made in the form of a regular libel.

“ The call being laid before the presbytery and read, the first step is to concur with it. Whether *the number* of signatures attached to it was such as to make it a good and sufficient call, was long a difficult and an agitating question. But there is much less ceremony on that point at present ; and *provided there are signatures attached to a call, a presbytery does not hesitate to concur with it*. The call being concurred with, it is put into the presentee’s hand, and he is asked if he accepts of it. On his doing so, the presbytery devolves on him the care of supplying the vacant parish with public worship.’

“ It remains for the presbytery to *judge of his qualifications*. Trials of exactly the same nature with those which he underwent before obtaining his licence as a preacher, are prescribed to him ; and these being finished to the satisfaction of the presbytery, he is required again to subscribe the formula ; the act against simony is read to him, a day is fixed *for serving his edict*, and another, at an interval of not less than ten days, for *ordaining and admitting him to be minister of the parish*.” “ If

“ the presbytery is *dissatisfied with the qualifications* of the presentee, and rejects him on that account, the questions that are put to him, and the answers received from him in the course of his catechetic trials, and the remarks of the presbytery upon the discourses delivered by him as part of his trials, are taken down in writing, and the discourses themselves are laid on the table, and docqueted by the moderator, that, in the event of an appeal, the whole may be transmitted to the Superior Court.

“ On the day appointed for the ordination of the presentee, the presbytery meets before the celebration of public worship, receives the report of the minister by whom the edict was served, and directs the officer to proclaim, at the most patent door of the church, *that if any one has objections to the life or doctrine of the presentee, the presbytery is ready to hear them.* A formal libel is not required upon that occasion. *But any objections that are made must be immediately proved to be valid.* They are otherwise disregarded.

“ The officer having returned, and none appearing to object, the presbytery direct the officiating minister who had been appointed to preach and to preside, to proceed with the ordination.”

What is here stated by Dr. Hill, is corroborated in the strongest possible manner, by other writers on the subject. Thus, Mr. Dunlop in his work on patronage, (edition 1833, page 102) says, “ That the decisions of the General Assembly, for the period of about a century, with very rare exceptions, and none of these of recent date, have *been uniform in refusing to give effect to the dissent of the congregation, and in enforcing the settlement of the presentee, if found qualified by the presbytery.*” And in the following section the same author shews how the “ Call” is mistaken now for a right in the people, as when it was the form by which they effected their “ choice” of ministers, while the right of choice belonged to them ; as well as the fact that, for a century, the law had been understood to be, that a qualified presentee could not be rejected even in respect of the *total absence* of signatures to a call. He says, page 104, “ The call thus subscribed and attested, is presented to the first ensuing meeting of the presbytery, whose next step is to pronounce a judgment concurring with it, *which is the form representing what originally was mainly a judgment holding the ELECTION by the people to be a good and sufficient election,* and a warrant for the presbytery to proceed to the trial of the presentee, preparatory to his ordination and admission, analogous to the judgment of the presbytery sustaining the presentation. As already mentioned, however, the presbytery hold the call to be sufficient, however few signatures may be attached to it ; and indeed, *on the principles at*

“*present held on this subject, the total absence of any signatures, or of any substitute for such, would scarcely seem a sufficient ground for not proceeding with the settlement, since the moderating in a call is said to be considered as merely affording the people an opportunity of encouraging the labours of their future minister, by addressing to him this invitation, but not at all necessary as an essential step in his admission.*”

Thus your Lordships see, that under the existing forms, applicable to the general laws of the church, the congregation are entitled to libel the presentee, or to state general objections against him; but that the latter can only be done on the return of the edict; and in order to obtain a sist of the procedure, the objections must be instantly verified. But if objections are to be stated of such a nature as to infer deprivation, they may be stated at any time, but must be embodied in the form of a distinct libel. The alteration on this state of the law, which the popular party contended for, was merely that the general objections might be stated, and the reasons for them shown, on the occasion when the people were afforded the opportunity of giving their consent to the settlement of the presentee, by the form of moderating in a call to him to be their pastor.

And if your Lordships will turn to the 4th, 5th, and 6th sections of the regulations of the General Assembly of 1834, you will find that they just carry out this principle of the general law of the church; and so far the regulations are not now excepted against. Under these three sections, any male head of a family, being a member of a congregation, may state special objections to the settlement of the presentee, “*of whatever nature such objections may be.*” If they affect his character or doctrine, and would, if established, have the effect of depriving him of his licence, the form of objection is by libel. But if the special objections relate to his insufficiency, or unfitness for the particular charge, all that the objectors are required to do is, to state the objections in writing, and substantiate them. If the presbytery consider them unfounded, they are to proceed in the settlement. But if the objectors establish, that the presentee is not fitted usefully and sufficiently to discharge the pastoral duties in the parish, then the presbytery are to find that he is not qualified—their sentence being subject to review. All this proceeds upon the people's right to dissent, but only upon cause shown. The presentee is, of course, the party responding to the objection. He is informed of it, and sees the proof led in support of it, and consequently he can be prepared to meet it. And what is more, if the presbytery err in finding him not qualified—if they act capriciously, or give effect to frivolous objections—their conduct can be corrected by the superior church judicatories.

But the additional element which the act of 1834 introduces, of an absolute dissent, by a section of the congregation, and which is, of itself, declared to be a sufficient ground for rejecting the presentee, and the presentation in his favour, is a totally different matter. It is conclusive. The sentence of rejection is not subject to review. If it be admitted that a majority of male heads of families dissent, all farther enquiry is excluded. Where no cause is required to be assigned, there can be no review. It is not consent which is the true meaning of a call, as the alleged basis of the pastoral relation. It is not a disapproval for reason shewn; but a prejudging by the congregation of the qualifications of the presentee before either the call or his qualifications come to be considered by the presbytery. If the fullest effect be given to the views which were entertained by the popular party in the church, the presentee would still have the advantage of appearing before the presbytery, and obviating the grounds of objection to his settlement. In that case the court had both objector and respondent before them; and of the validity of the objection, and the sufficiency of the answer they were in a situation to judge. The very entry of a disapproval necessarily brought the presentee forward. But under the operation of this part of the law of 1834, he is rejected without the presbytery ever having had an opportunity of seeing him. He is not required to be present at the meeting for moderating in a call; and though he were, no eloquence, however persuasive—no conduct however unexceptionable—no depth of piety or desire to be useful in his vocation—could be of the slightest avail to him; his lips are sealed, and he could only be present to hear each successive individual utter the word *dissent*. A more absolute species of blackballing a person presented to an office cannot well be imagined. It is a totally new and heretofore unheard-of restraint upon a patron's right of nomination; and though the form of the call is used as the means of affording an opportunity of consent, it is utterly absurd to say, that a power to consent implies an arbitrary right to dissent; and that such dissent *per se* is a conclusive ground for the presentee's rejection.

I said sometime ago, that it lay with the defenders to establish that the church had the power to regulate and define a call, by adjecting any quality they thought proper to their admission of a presentee to the pastoral office. But, notwithstanding all that I have heard and all that has been written on the subject, I have not been able to discover that those who support the power of the church to make the law of 1834, are agreed, or nearly agreed, as to what the moderating in a call to a presentee to be minister of a parish means, under the existing law, with patronage as a part and parcel of it. I quite understand the doctrine of

those who totally repudiate the law of patronage, and maintain, that *jure divino*, or on grounds of expediency, the nomination or the calling of ministers should be in the congregation. Their principle, and the form of carrying it into effect by means of a writing designated a call by the congregation of the vacant parish of A. B. to C. D. a minister or licentiate of the church of Scotland to be their minister, is quite intelligible. But the combination of a call with the right of presentation in patrons as by law established, is not only unintelligible but inconsistent. Under no statute will your Lordships find any authority for a union of presentation by the patron, and calling by the congregation. It is the patron's right to present a qualified person. The members of the congregation may consent to the settlement, but that they can dissent or negative the settlement without stating and proving that the presentee is disqualified, is inconsistent with the very nature of the right of presentation; and accordingly, as your Lordships and the House of Lords decided, in the case of *Gillon v. the Duke of Gordon*, the effect of the presbytery's sustaining a presentation as valid, is to entitle the presentee, even before induction and ordination, to vindicate all the rights pertaining to the benefice in the civil courts. as the proper defender in any question whereby these rights may be effected.

The church cannot deny effect to a presentation. The church has never ventured to declare what number of subscriptions are necessary to constitute a sufficient call. Many overtures have been made to the General Assembly on the subject. Some of them have besought the Assembly "to adopt such measures as "it might deem proper for converting calls from a dead form into "a living reality!"—or "from a matter of mere form and expression to one of real and substantial efficiency;" or to declare, according to the fancies of synods and presbyteries, in every variety of form and expression, what the law is, or what it ought to be on the subject. But the eminent individuals on both sides of the church by whom the deliberations of the Assembly were for the last century guided, saw perfectly the difficulties with which the subject was beset, as well as the misapprehension which had prevailed among some of their brethren as to the true nature of a call under the subsisting law. They were aware that the church could not legislate on the subject without entering upon ground where they had no right to tread, and interfering with the civil rights of patrons in a way, and to an extent, competent only to the Legislature. Some of my friends who have taken a part in the discussion elsewhere, have admitted, that they can discover no authority for what they call an active call,—or in other words, a positive assent to the settlement by the congregation. And others again have maintained that the veto law of 1834, which is en-

titled "overture and interim act on calls," is totally misnamed—that they never could see what connection it had with calls—or how, by the introduction of a veto, the call could be either regulated or affected.

But the defenders allege that they can appeal both to authority and precedent in support of the argument, that the veto is a portion of "the matter of the call," and that therefore it was in the power of the Church to pass the act and regulations. In the *first* place, they refer to the Second Book of Discipline, which, I have already shewn, does not, either according to its own spirit, if it were wholly the law of the Church, or as sanctioned by the charter of presbytery, give the slightest authority to the defenders' argument.

The defenders next refer to the Directory of 1649. But before quoting it, it is proper that I should inform your Lordships of the following facts: In the year 1645, which has been represented as the purest period in the history of the Church of Scotland, the General Assembly, when framing the scheme of polity, which it was at the time intended to establish throughout the whole of Britain, and in which the then conceived notions as to the power of the Church in relation to expectants of the ministry would naturally be exhibited, did very explicitly define the nature and extent of that power. The preamble of the statute 1645 is as follows: (see Collection containing the Confession of Faith, and Form of Church Government, &c. p. 525)—"The General Assembly being
 "most desirous and solicitous, not only of the establishment and
 "preservation of the form of kirk government in this kingdom,
 "according to the Word of God, Books of Discipline, acts of
 "General Assembly and National Covenant, *but also of an uniformity of kirk government betwixt these kingdoms*, having thrice
 "read, and diligently examined the propositions hereunto annexed, concerning the offices, assemblies, and government of the
 "kirk, *and concerning the ordination of ministers*, brought into us,
 "as the results of the long and learned debates of the Assembly
 "of divines sitting at Westminster; after mature deliberation,
 "and after timeous calling upon, and warning of all who have
 "any exceptions against the same, to make them known, that
 "they may receive satisfaction, doth agree to and approve the
 "propositions fore-mentioned, touching kirk government *and*
 "*ordination.*"

Under the section "Touching the *Doctrine* of ordination," (p. 539,) it is "enacted, that he who is to be ordained minister, is to
 "be examined and approved of by those by whom he is to be ordained.
 "No man is to be ordained a minister for a particular congregation, *if they of that congregation can shew just cause*
 "*of exception against him.*" This is repeated under the section

entitled, "Doctrinal part of ordination;" and in the Directory for the ordination, after a detail of the preliminary steps, it is provided, "that there shall be sent from the presbytery to the congregation, a public intimation in writing, which shall be publicly read before the people, and afterwards affixed to the church door, to signify, that on such a day a competent number of the members of that congregation, nominated by themselves, shall appear before the presbytery, *to give their consent or approbation to such a man to be their minister, or, otherwise, to put in, with all christian discretion and meekness, what exceptions they have against him*; and if, upon the day appointed, there be *no just exception*, but the people give their consent, then the presbytery shall proceed to ordination."

It is very manifest, therefore, that in the opinion of the church, ordination to a particular congregation could only be refused when *just exceptions* were taken by the people against the minister, the presbytery being the only proper judges of the exceptions. And where there were no just exceptions taken, *the consent of the people was held to be implied*.

Your Lordships will immediately see how the views of the church were afterwards followed out. In the month of March 1649, an act was passed by The Convention of Estates, abolishing the patronages of kirks as a popish custom, brought into the kirk in the time of ignorance and superstition, and as contrary to the Second Book of Discipline." Patronages are therefore declared to be null and void, and it is farther ordained, "That if any presentation shall hereafter be given, procured, or received, that the same is null and of no effect, and that it is lawfull for presbytries to reject the same, and to refuse to admit any to trialls thereupon, and notwithstanding thereof, to proceed to the planting of the kirk upon the sute and calling, or with the consent of the congregation, on whom none is to be obtruded against their will. And it is decerned, statute, and ordained, that whosoever hereafter shall, *upon the suit and calling of the congregation*, after due examination of their literature and conversation, be admitted *by the presbytry* unto the exercise and function of the ministry in any paroch within this kingdom, that the said person, or persons, without a presentation, by virtue of their admission, hath sufficient right and title to possesse and enjoy the manse and gleib, and the whole rents, profits, and stipends which the ministers of that burgh had formerly possesst and enjoyed, or that hereafter shall be modified by the commission for plantation of kirks; and decerns all titulars, and tacksmen of tythes, heretors, liferenters, or others subject and lyable in payment of ministers' stipends, to make payment of the same, notwithstanding the minister his want of a presentation;

“ and ordains the Lords of Session, and other judges competent, to give out decreets and sentences, letters conform, horning, inhibition, and all other executorials upon the said admission of ministers by presbyteries, as they were formerly in use to doe upon collation and institution following, upon presentations from patrons. Declaring alwayes, that where ministers are already admitted upon presentation, and have obtained decreets conform thereupon, that the said decreets, and executorials following thereupon, shall be good and valide rights to the ministers for suiting and obtaining payment of their stipends; and the presentation and decret conform, obtained before the date hereof, shall be a valid ground and right for that effect; Notwithstanding the annulling of presentations by vertue of this present act, And because it is needful that the just and proper interest of congregations and presbyteries in providing of kirks with ministers, be clearly determined by the Generall Assembly, and *what is to be accompted, the congregation having that interest*; Therefore it is hereby seriously recommended unto the next Generall Assembly clearly to determine the same, and to condescend upon a certain standing way for being a settled rule therein, for all time coming.”

By this act, then, patronage was abolished, and, as a substitute, the congregation were to call, while the presbytery were to examine and admit. The call of the congregation was substituted as the parties' title to require that the presbytery should try him, and if qualified, admit him to the office, in the same way as the deed of presentation had been under the act 1592, and is now, under the act 1711, his title to require and enforce the performance of these acts by the presbytery.

It was, however, by the act 1649, left to the General Assembly to determine who were to be accounted the congregation having interest in the matter. The General Assembly met accordingly in the month of August in the same year (1649,) when they framed what they called a *Directory for the Election of Ministers*, and which, as it is the ecclesiastical statute on which the power of the Assembly to pass the interim act and regulations of 1834 has been mainly rested, I shall now read. It is expressed thus:—

“ 1. When any place of the ministry in a congregation is vacant, the presbytery do, with all diligence, send one of their number to preach to that congregation, who, in his doctrine, is to represent to them the necessity of providing the place with a qualified pastor, and to exhort them to fervent prayers and supplication to the Lord, that he would send them a pastor according to his own heart. As also he is to signify, that the presbytery, out of their care of that flock, will send unto them preachers whom they may hear; and if they have a desire to hear any

“ other, they will endeavour to procure them a hearing of that person or persons upon the suit of the elders of the presbytery. 2. Within some competent time thereafter, the presbytery is again to send one or more of their number to the said vacant congregation, on a certain day appointed before for that effect, who are to convene to hear sermon the foresaid day; which being ended, and intimation being made by the minister, they are to go about *the election of a pastor* for that congregation; the session of that congregation shall meet, and proceed to *the election*, the action being moderated by him that preached; and if *the people* shall, upon the intimation of the person *agreed upon by the session, acquiesce and consent* to the said person, then the matter being reported to the presbytery by commissioners, sent from the session, they are to proceed *to the trial of the person thus elected*, and, finding him qualified, to admit him to the ministry in the said congregation. 3. But if it happen, that the *major part* of the congregation *dissent* from the person agreed upon by the session, in that case THE MATTER shall be brought *unto the presbytery, who shall judge of the same*; and if *they do not find their dissent to be grounded upon causeless prejudices*, they are to appoint a new election, in manner above specified. 4. But if a *lesser part* of the session or congregation *shew their dissent* from the election, *without exceptions relevant and verified to the presbytery, notwithstanding thereof the presbytery shall go on to the trials and ordination of the person elected*; yet all possible diligence and tenderness must be used, to bring all persons to an harmonious agreement. 5. It is to be understood, that no person under the censure of the kirk, because of any scandalous offence, is to be admitted to have hand in the election of a minister. 6. Where the congregation is disaffected and malignant, in that case the presbytery is to provide them with a minister.”

On a fair construction of its terms, this enactment did not confer any right on the congregation of a parish to exclude, by the absolute dissent or *veto* of their majority, the right of the church to inquire into and judge of the qualifications of nominees. On the contrary, all the length it went was to re-assert the ancient and undoubted right of the church to judge of the qualifications of nominees; conferring, at the same time, this privilege on the objectors—if constituting the *major part* of the congregation—that their exceptions given in to the presbytery, whether relevant and such as could afterwards be verified or not, obliged the presbytery *to delay* proceeding to the trials and ordination of the nominee, until they should have examined into and judged of *the grounds of the dissent*. Again, if the *lesser part* only of the session or congregation dissented, and their objections were not relevant, or

not instantly verified, the presbytery, notwithstanding thereof, were bound to go on with the trials and ordination of the nominee. In that case, no delay or inquiry was admitted. But whether the major part of the congregation, or the minor part of them, dissented, "*the matter*" was to be brought before the presbytery, who were "*to judge*" of the same as a court whose judgment was reviewable by the superior judicatories.

It has been said that "*the matter*" to be brought before the presbytery, means the mere *fact* of the *dissent being by a majority of the congregation*. But, with deference, that construction of the Directory can never be adopted without excluding the power of judgment on the part of the presbytery altogether. If the presbytery were to do nothing more than *to count* whether there were a majority of the congregation dissenting, that would exclude their *judging of the matter*, and their finding, by their sentence, whether or not the dissents "*were grounded on causeless prejudices*." Whether there were a majority of the congregation dissentients, was held to be a point fixed and ascertained *before the matter was brought into the Presbytery at all*. But whether *the grounds* of the dissent were valid or not, was *the matter* for the judgment of the presbytery. It was *imperative* on them to judge in the matter; and to enable them to do so the dissenters behoved to state their reasons. The *onus* is clearly laid on the dissenters, because those who are constituted judges, could only determine whether the dissents were grounded on causeless prejudices, from the nature of the reasons assigned.

It has likewise been said, that the true nature of the privilege conferred on the *majority* of the congregation, can only be ascertained by attending to the terms of the alternative right which is vested in the *minority*. It is admitted that the minority must *show* their dissent, by stating relevant exceptions and instantly verifying them. And hence it is inferred, where the *majority* dissent, that their dissent is *absolute*. But the conclusion is not warranted by the premises. The minority must, *in order to stay* the process of trial and ordination, instantly shew their dissents to be relevant, and they must instantly verify them. But when it is fixed before coming to the presbytery, that a majority have dissented, such dissent is of itself a sufficient warrant for the presbytery to sist procedure, so as to allow the majority to obtain evidence and substantiate their objections, and the presentee to meet the same; or, in other words, to allow the dissentients, by substantiating their objections, to show that they were not founded upon causeless prejudices, or the presentee to show that they were; and that is all the difference betwixt the two cases. The words of the directory admit of no other construction, and confessedly by those well qualified to judge of such matters, they never

have received any other construction, until certain new lights broke forth about the year 1833. In the passage formerly quoted from *Sir Henry Moncreiff's work*, that eminent person states, in the most explicit terms, that, according to "*all the laws and usage which followed the Second Book of Discipline*, the right of the people consisted either in their giving their *consent* to the nomination, "or to state and substantiate *their objections*, "*of which the presbytery were to judge.*" And in a prior passage, while speaking of this Directory of 1649, he observes, p. 34, "If a *majority* of the congregation dissented, *they were to* "GIVE THEIR REASONS of which the presbytery *were to judge.* "If the presbytery should find their dissent founded on causeless prejudices, they were, notwithstanding, to proceed to the "settlement of the person elected."

It may likewise be observed with reference to this Directory, that it can have no proper application to the Church of Scotland, as established with patronage as one of the elements in its constitution. It was made for totally different state of things, and while patronage was abolished. As an edict of the church it may remain; for it is not the practice of the ecclesiastical legislature to repeal, in express terms, any of its enactments. But it is not a law of the church as now established, and consequently, even if its terms had been different, it could not authorize the church to adject new conditions to the exercise of the right of patronage, which are, in substance and effect, an abrogation of the right itself.

3. The defenders next endeavour to support their argument by citing the terms of the act of the General Assembly in 1736, whereby the Assembly considering:—"That it is, and has been since "the Reformation, the principle of this church, that no minister "shall be intruded into any parish contrary to the will of the congregation, do, therefore, seriously recommend to all judicatories "of this church, to have a due regard to the said principle in "planting vacant congregations; and that all Presbyteries be "at pains to bring about harmony and unanimity in congregations, and to avoid every thing that may excite or encourage "unreasonable exceptions in people against a worthy person that "may be proposed to be their minister, in the present situation "and circumstances of the church, so as none be intruded into "such parishes, as they regard the glory of God and edification "of the body of Christ." It appears to have been, from this act, that the interim law of 1834 was taken. In the latter, it is said to be "a fundamental law" of the church; in the former, "that it is, and has been since the Reformation, the principle of "this church," that no minister shall be intruded into any parish contrary to the will of the congregation. The act 1736 declared that such was the principle of the church; but it was a

principle which was never attempted, in the sense maintained on the other side, to be carried into effect. It is well known that the declaration of the Assembly in 1736 was a mere expedient, to allay the discontent which had been excited by the act of Queen Anne restoring patronage. And if more was intended, it is evident that it never could receive effect consistently with the due effect being given to the rights of patrons. But neither for *the principle* declared in 1736, nor for what is termed the “fundamental law” in 1834, is there any authority in the civil statutes, or in the rules of the church as established by law. Of itself, the General Assembly, or the church, has no more right to make any law indirectly nullifying the right of patronage, than they have to assume the power and authority of directly repealing the statute of Queen Anne. I have said that the act of Assembly 1736 was not acted upon. Sir H. Moncreiff says, that in a few cases of disputed settlements it had perhaps some effect; and, as an example, he cites the case of the parish of Currie, to which I have already had occasion to refer. Sir Henry, however, thus characterizes it, (p. 61):—“It is scarcely conceivable that the act passed “at this time (1736) could have done *more than sooth the discontent “of the people — by conciliatory language, unless more had “been attempted than perhaps was practicable; and unless the “act had been followed up by a train of authoritative decisions, “—which was far from being intended. It does appear, however, “that, for some years after this time, the sentences of the As- “semblies, in the settlement of ministers, are expressed in a “more guarded and softened tone, than had been usual during “some of the preceding years. They discover more solicitude “to deal tenderly with the people, and not to irritate their humours, by unnecessary exertions of authority. To this extent, “the enactment appears to have had some effect; and it ought perhaps in candour to be admitted, that the majority of those who “were concerned in it might, at the time, have imagined it possible to have done more, to connect the settlement of ministers “with the consent of the people, which it supposed to be essential, “than was afterwards found practicable, even by themselves. At “the sametime, it is equally evident, that the members of the “Church who had been most determined, in disregarding the “opposition made to the induction of presentees, if they concurred “in this enactment, as they seem to have done, could have intended it as *nothing more than a concession in words to the “prejudices of the people, without any view to its influence on their “decisions in particular cases, or to such a change of system as “could have had any practical effects.”**

If it be a fundamental law or principle of the Church, that no pastor shall be intruded into a parish contrary to the will of the

people, how, I ask, comes it that presentations *jure devoluto* by presbyteries, do not fall under the fundamental law, but according to the seventeenth of the regulations 1834, "shall be proceeded in according to the general laws of the Church?" If this is a fundamental law which is to have "full effect," how comes it, that it is not included among "the general laws of the Church?" or what are "the general laws" in contradistinction to "the fundamental laws" of the Church?

I should like your Lordships to be informed on these points. All I can discover on the face of the enactment is, that, there is what is termed a fundamental law of the church, which is to be "carried into full effect" in every case when a *lay patron* presents—that is to say, the people may *veto* as often they please his presentee; but "that cases of *presentation* (mark the word,) by "the presbytery *jure devoluto* are exempted from the fundamental law." In such cases, let the will of the people be what it may, presentees may be intruded on the congregation, because that is "according to the general laws of the church!" It appears as if the observation which Sir H. Moncreiff applies to the act 1736, were, in all respects, applicable to the interim act of 1834—that it was an attempt to sooth the people by conciliatory language, and to concede to them a right which it was perhaps supposed they either would never exercise, or which, if they did exercise, would only ultimately have the effect of concentrating the right of presentation, "according to the general laws of the church," as well as the right of collation, absolutely in the church courts.

I have mentioned that the act of Queen Anne restoring patronages was very unpopular. Many persons were opposed to it on principle—believing that the election of pastors should either be in the congregation, or in the heritors or elders of a parish, as being the classes of persons most deeply interested in the proper and efficient discharge by a parochial clergyman of his several duties. But there were others who believed that the act restoring patronages was but part of a scheme devised for upsetting the Protestant dynasty, and restoring the exiled Stuarts. Both of these parties were incessant in their endeavours to obtain a repeal of the law. In 1735 certain resolutions were adopted by the General Assembly which are understood to have been framed by the first Lord President Dundas. They were afterward converted into a petition to his majesty, wherein I find, while the act of Queen Anne was stated to be in itself highly inexpedient, as well as in violation of the treaty of Union, that it was still more strongly alleged to have been obtained by certain disaffected persons "in resentment against the Church of Scotland, and that farther threatenings were "by these persons breathed out against her for her firm and loyal adherence to the revolution interest, and especially to the succession

"of the Crown in your majesty's royal Protestant family, was not then denied, but boasted of, and is still remembered by all who observed these times!" It was in the same year 1736, that the General Assembly "empowered and directed their commission to make due application to the King and Parliament for redress of the grievance of patronage in case a favourable opportunity for so doing shall occur during the subsistence of this commission." And the same power and direction were contained in each successive commission until the year 1782, since which time they have been discontinued.

But though the act of Queen Anne was complained of on the grounds which I have stated—and though the exertions were made to obtain its repeal—it does not appear ever to have suggested itself to the minds either of the clergymen who guided the deliberations of the church in those days, or of the distinguished lawyers who acted along with them in these matters, that it was within the power of the church itself to remedy the evil. They did not suppose that in the process of moderating in a call to a presentee, a *veto* or arbitrary dissent could be given to the people. As little did they suppose that the power belonged to the church, which the presbytery of Auchterarder now say she possesses, of prescribing the requisites and conditions, however inconsistent with, or subversive of the rights of patronage, on which alone she will bestow the pastoral office. The patrimonial rights of patrons and presentees were the same in all respects in 1834 as in 1736. The State has conferred no new powers on the church; and if for a century after the passing the act of Queen Anne, it was considered that the Legislature alone could afford redress of the grievances of patronage—why should not the Legislature have been appealed to in 1834? The General Assembly of that year assumed a power of legislation which no other Assembly had ever attempted; and if the power which it has exercised be sanctioned, it seems to me very clear that the Assembly may next year pass an interim law to the effect that no pastor shall be ordained and settled in a parish on a presentation by a lay patron.

Lastly. The defenders refer to the act of Assembly 1782, which is in these words: "That the moderation of a call in the settlement of ministers, is agreeable to the immemorial and constitutional practice of this church, and ought to be continued." It is generally admitted that this proposition is very loose and unguarded, and one by no means definite. If those who framed it meant merely that it was agreeable to the constitutional practice of the church to moderate in a call, thereby affording the heritors, elders, and congregation an opportunity of expressing their assent and readiness to encourage and strengthen the hands of the presentee in his labours, it was inoffensive. It violated none of the

rights of patrons under the existing laws. But if it was meant that a call was essential to the completion of the settlement—or that any section of the congregation had by their arbitrary dissent, a negative on his appointment, then I submit that the declaration, though merely abstract in its nature, and not carried out to any practical effect, was one which the General Assembly had no power to make. But the truth I believe to be, that the majority of the Assembly by whom the Declaration was passed kept it vague and general, just because they were wholly unable to define what it meant. They could not surely mean to affirm that *assent*, expressed or implied, is the same thing with an *arbitrary dissent*, of the grounds of which no one can take cognizance or judge. If they did any thing of the kind they interfered with rights which they had no authority to touch. I have already shewn how the interests of the people in the settlement of a minister were otherwise protected. Objections of whatever nature to the presentee may be stated by them either in the course of the process, or on the return of the edict; and moreover, your Lordships will observe, with reference to the supposed connection betwixt the *veto* and a call, that in one view they are utterly repugnant to each other. The call may be signed, in evidence of their consent, by all the heritors and elders in the parish, and by *all* the members of the congregation, saving and excepting the bare majority of those who happen to stand on a particular list of the *male heads of families*, members of the congregation, and in full communion with the church. The controul is given to a very limited portion. There may be in a family half a dozen sons, members of the congregation and in communion with the church, all of whom may sign the call. But under the law of 1834 as they are not heads of families, they are excluded from the right of arbitrary dissent—and so it may very easily happen, though a call be actually signed by nine-tenths of the heritors, elders and members of the congregation, that the presentee is rejected in respect there is opposed to him a bare majority of the male heads of families members of the congregation in full communion with the church, and whose names stand on a particular roll. And thus, the presentation and settlement is set aside *against the will* of the congregation, and in respect of the *veto* of a very small section of a particular class of the congregation. This fact illustrates all that I have already said as to the impossibility of the church of itself, passing any law under the pretence of regulating the process for completing the pastoral relation, which prescribes *unknown requisites and conditions* to the exercise of the patron's right, and which, with all the anxiety possible, it is not in his power before hand to ascertain.

But the defenders carry their argument farther. They main-

tain, that even if the interim law and regulations do not refer at all to the matter of the call, but have established a *new test of qualification in a presentee*, it is in the power of the church to prescribe this, or any other requisite and condition she may think proper, in compliance with which only she will confer the pastoral office. I again refer your Lordships to the passage I formerly read from p. 43 of the defenders' case. In the *first* place, I must take leave to observe, that if the power of the church be as unlimited as the defenders contend it is—if she can adject any requisite or condition she pleases to the collation and settlement of ministers in parishes on presentations, there is an end to all the laws establishing lay patronage, and nothing to prevent its being declared a *disqualification* in a licentiate of the church that he shall accept of a presentation from a lay patron.—I presume it will not be considered as a disqualification to accept of a presentation from a presbytery, *jure devoluto*, because that case falls under “the general laws of the church.” In the *second* place, I submit that it is too clear to admit of any doubt, that such an unlimited power in the church cannot exist in connection with the astringent and obligation imposed by the statutes 1592 and 1711, on the church courts to try and judge the qualifications of presentees, and to admit and receive them, if qualified, as ministers of parishes. The State imposes this duty upon the church courts as judges, and the church cannot, in its legislative capacity, release its judicatories of those obligations, or enact laws anywise inconsistent therewith, unless, to be sure, under the vague phrase “of regulating the whole matter of conferring the pastoral office,” they can abrogate every law conferring civil rights on others, and imposing relative duties on the church courts. In the *third* place, the church cannot prescribe, as a test of qualification, or of disqualification of a presentee, any thing but what can beforehand be known and ascertained by patrons. The very form of the deed of presentation on which the church courts have all along acted, shews this. The patron there states that *he has been sufficiently informed* of the literature, loyalty, *qualifications*, good life, and conversation of A. B., preacher of the gospel. There are certain known tests with which he behoved to be acquainted. But by what power, I ask, can a patron know whether a presentee is qualified, if the first test of qualification or disqualification is sealed in the breasts of a majority of male heads of families members of the congregation, standing on a certain roll, not one of whom, when they come to exercise the veto, may have seen the presentee, or heard him open his lips? It is ludicrous to speak of the veto as a test of qualification, or as a thing which a patron may know when he presents to the presbytery a qualified presentee. In the *fourth* place, the veto never can be a test of qualification under the laws and statutes of the

church and state, inasmuch as it is the presbytery who, in the first instance, are obliged to judge of the presentee's qualifications for the pastoral office. It is in that sense only, and with the presbytery as judges, that any test of qualification can be considered. But the veto of a section of the congregation does not admit of any exercise of judgment by the presbytery. If there be any judgment in the matter, it is the separate judgment of each individual composing the majority of male heads of families, and that, too, in its effect absolute. The presbytery cannot review it under the law; and even if it were pretended they could, they have not the means of doing so. Their sentence rejecting the presentee and presentation, is not a judgment upon the presentee's qualifications, but a sentence conform to the veto, or sentence of the male heads of families, interposed in order that the presentation may be rejected, and the parish of new declared vacant. In the *fifth* place, not only did the state impose on presbyteries the duty of trying the qualifications of presentees, but it is one of the principles of the presbyterian constitution, that the trial of entrants shall be in the church alone. It is an inalienable right. The candidates for the ministry have always been taught to qualify themselves for trial by the church courts, and by them alone. The power of examination was sanctioned and confirmed by the state, in the belief that in the church courts it was safe. It cannot be delegated to others, without subverting not only the civil statutes, but the very principle of presbytery itself. And instead of candidates for the ministry qualifying themselves to be judged of by the church courts, they must study to qualify themselves for obtaining the suffrages of the male heads of families; and even those who have been ordained, if they look to a better benefice, they must accommodate themselves to the same new standard of clerical principle and action.

I believe I need scarcely state to your Lordships, that tests of qualification for any office must in their nature be personal to the candidate. They must be such as can be perfectly known to him who seeks to qualify himself, as well as to the patron, or other person having the nomination. The qualifications of nominees are to be tried and judged of, and the judgment pronounced upon them is reviewable by superior judicatories. Tests of qualification, therefore, must be known and defined tests—they cannot be arbitrary or undefined. In the statutes which I have already had occasion to quote, your Lordships must have observed that the obligation on a patron to present a qualified person had reference to the personal qualities of the presentee. I need not again trouble you by particular references. But you will remember, that under all these laws and usages of the church, the congregation behoved to show cause for their dissent, which of necessity ex-

cludes the idea of an arbitrary dissent being a test of disqualification. And I may only, in addition, refer to the act of assembly 1596, four years after the establishment of the presbyterian church, and while patronage was the law, which contains a series of declarations and resolutions as to what is requisite in a qualified presentee, and which were again repeated and confirmed by the General Assembly in 1638. They are in these terms:—"Forasmuch as by the
 "too sudden admission and *light trial* of persons for the ministry,
 "it cometh to pass that many scandals fall out in the persons of
 "ministers; be it ordained, that in time coming, *more diligent*
 "*inquisition and trial* be used of all such persons as shall enter
 "into the ministry." Following out this, the assembly enact,
 "that *the trial* of persons to be admitted hereafter into the minis-
 "try consist, not only in their learning and ability to preach, but
 "also in conscience, and in feeling and spiritual wisdom; and
 "namely, in the knowledge of the bounds of their calling, in doc-
 "trine, discipline, and wisdom, to behave themselves accordingly
 "with the diverse ranks of persons within their flocks; as namely,
 "with atheists, rebellious and weak consciences, and such other
 "wherein the pastoral charge is most wanted; and that they be
 "meet to stop the mouths of the adversaries, *and such as are not*
 "*qualified on these points, to be delayed till farther trial; and till*
 "*they be found qualified.* And because men may be found meet
 "for some places, who are not meet for others, it would be con-
 "sidered that *the principal places* of the realm be provided by men
 "of *most worthy gifts, wisdom, and experience*, and that none take
 "the charge of a greater number of people nor they are able to
 "discharge." I believe that it was out of the act 1596, that the
licencing after trial, candidates for the ministry, had its origin.

The defenders also found upon the fact, that the church has been in use to prescribe or adjudge certain tests of qualification of presentees, and from thence it is inferred, that she has equally the power of prescribing that the arbitrary-dissent of a section of the congregation shall be an absolute test of disqualification. But any test heretofore prescribed, has been in its nature totally different from the veto. They are all capable of being known both to patron and presentee, and are in their nature the reverse of arbitrary. For example, the church has been in use to require of candidates for the ministry a certain knowledge of theology and of languages, and a certain attendance at classes of divinity and church history, in the universities where those subjects are taught by members of the church. But these are qualifications which a patron has the means of easily ascertaining. They are strictly personal qualifications. In like manner it has been adjudged, in relation to certain parishes where a considerable portion of the population speak and understand only the Gae-

lic language, that the minister shall be able to preach to them in that language. That also is a matter personal to the presentee, and easily ascertainable before-hand by the patron. Further, it is alleged that the church has exercised its power in fixing the qualifications also of those entitled *to vote* in the calling of ministers, and the defenders found upon the act of Assembly 1748, which is as follows: "That in the moderation of *calls to ministers for supplying vacant parishes*, no person shall be entitled *to vote* who has either twice heard sermon in any meeting not allowed by law, or attended divine worship performed by a nonjuring clergyman, or where the king and royal family have not been prayed for by name." But the defenders do not seem to have adverted to the fact, that this act of Assembly has no relation to a call in connection with a presentation, but relates exclusively to calls under the principle of the act 1690. Its words prove this. It bears to be "of Calls to Ministers for supplying vacant parishes," and the disqualification is *to vote* in the election or choice of ministers. There is no doubt from its terms that such is its meaning. But if there could be a doubt raised on the subject, I trust it will be removed by what I am about to state. While the act 1690 was in operation, the act 1693. c. 6, was passed, whereby, for the further security of the protestant religion, the oath of allegiance and assurance is required to be taken "by all persons in offices and places of public trust, civil, ecclesiastical, and military;" and among others, by "all heritors voting in the calling of the ministers, and all others whatsoever, giving voice in the calling of ministers at their meeting for that effect." Now, it is well known that the act 1690 is still the rule in those cases where the people availed themselves of the right to purchase the patron's right, as well as in others where the election is, by the terms of the particular endowment, in the people, as in the parishes of Canongate, Cadder, and others, and in chapels of ease; and to all such cases the Act of Assembly 1748 applies. Further, in consequence of the rebellion in 1745, the act 39 Geo. II. c. 39, was passed, extending the act of *William and Mary* to the effect that no person should be capable of electing or being elected member of Parliament, magistrate or councillor of a burgh, deacon, or collector of land-tax, &c. &c. who had been twice, within the by-past year, present in any congregation, or Episcopal meeting, not held or registered in terms of the 10th of Queen Anne, or where the minister officiating did not, in express terms, pray for the king and his successors. Now, the General Assembly in 1748 passed their resolution, that the civil law should be enforced against parties appearing before them in their church courts, to exercise the right which the statute had conferred, and which, though repealed, was still conceded in many cases, of giv-

ing voice in the calling of ministers. The defenders further found on the limitation said to be imposed on the exercise of the right of patronage by the General Assembly, when, in 1779, it declared, that licentiates of *other Presbyterian churches* should not be considered as qualified persons, in the sense of the statutes, to receive and hold presentations to parishes within Scotland. But it is evident that this was merely a correction of an abuse, and not a limitation of the just rights of patrons. The church courts, it is conceded, are entitled, on sufficient grounds, to reject candidates who present themselves for trial, in order to be licensed as probationers; and it may just as well be said, that they are not entitled to reject any one, how clearly soever he may be disqualified, because forsooth that would be limiting the numbers from among whom patrons might choose. The cases founded on by the defenders, therefore, have in reality no bearing on the present one.

In supplement and illustration of these views, the defenders say that after all, the pursuers have no right to complain of the rejection of Mr. Young on the admitted ground of *veto*, inasmuch as they might have rejected him *without stating any grounds*, and that rejection without assigning cause, would in effect be the same as rejection in respect of the arbitrary dissent of the congregation. But surely the Presbytery don't mean to maintain, in the face of the statutes—if they refused a presentation, or to take a presentee on trials—that *he would have no remedy in the civil court*? It has been shewn that the presentee has an interest in the office, and a *status* conferred by the presentation, apart altogether from the stipend; and, by virtue of that interest, he can compel the ecclesiastical court to discharge its duty. If in the discharge of that duty the church court errs, yet keeps *within* its proper jurisdiction and limits, the superior church courts have the power, and it is to be presumed they would not fail, to set the inferior judicatory right. But if the Presbytery *step out of its jurisdiction* altogether—though by the direction of the superior court—and infringe the patrimonial rights of the pursuers, it is the civil court alone that can competently give redress.

Before drawing the attention of your Lordships to the decisions, I have only farther to notice, that the defenders have maintained in their case, that all the argument on the part of the pursuers as to the laws of the church is here totally out of place. It is irrelevant, they say, because it was stated and overruled by the General Assembly of 1834, who passed the interim act and regulations. In short, the sum of the argument seems to be, because the church has declared that it has power to enact the law and regulations, therefore your Lordships cannot enter upon the inquiry whether such a power really belonged to them. If it was within the power of the church to make the law, it is conceded that with the policy

of it your Lordships have nothing to do. On the other hand, whether the church exceeded its powers, and violated the patrimonial rights of the pursuers, is a proper subject of inquiry for your Lordships. You are entitled to cognosce and determine upon the admission of ministers to all civil effects whatever. The spiritual act of ordination you cannot undo, more than you can ordain a minister; but of every thing relating to the benefice, and to the duties imposed by statute upon the church courts therewith connected, you can take cognizance and determine. If the civil authority did not possess that right, there is no excess of power of which the church could be guilty, and no consequences, however fatal to civil rights, for which there would be a remedy. But your Lordships are entitled to look at and consider, the laws of the church, as well as of the state, and the decisions of the church courts, as well as the decisions of this court and of the House of Lords, in order to explicate your own jurisdiction.

I now request the attention of your Lordships to the following decisions. The first case to which I refer your Lordship is that of (*Auchtermuchtie*) *Moncrieff v. Maxton*, 15th February, 1735, M. 9909; and *Elchies voce Patronage*, No. 1. The Report in both collections is extremely meagre; and as the case is one which bears, in many important particulars, on the present one, I must take the liberty of stating the circumstances as I find them detailed in Lord Dunmore's Collection of Session Papers, which are now possessed by the Dean of Faculty.

“The parish of *Auchtermuchty* having become vacant in the end of January 1733, my Lady Newark granted a presentation to Mr. Matthew Moncrieff, *probationer*; and Mr. Moncrieff of Reddie, who was then in a treaty for a purchase of the patronage, and has since purchased the same, joined in the presentation. And the presentation being regularly accepted by Mr. Moncrieff, the presentee, was offered to the presbytery at their meeting, the 22d of May 1733, and at the same time the presbytery was desired to proceed to the settlement of Mr. Moncrieff upon the presentation.

“That the presbytery thought fit to refuse the patron's desire, at least to delay the matter till the 19th of June; and at their meeting upon that day, which was still a considerable time within the six months, they so far rejected the presentation, that they appointed a moderation at large of a call to a minister for the 17th of July, as if the right of presentation had been in the presbytery's hands; and in pursuance of this appointment, a call having been signed to Mr. Maxton upon the said 17th of July, which was still within the six months, and another at the same time for Mr. Moncrieff, the presentee, the presbytery thought fit, at their next meeting, upon the 24th of July, to

“ *reject the presentation, and the call to Mr. Moncrieff in concurrence with it, and approved of the call to Mr. Maxton.*

“ The patron having appealed to the synod of Fife, the presbytery’s sentence was by them affirmed; and the patron having brought the matter to the *commission*, (to whom the *General Assembly 1733* had referred the settlement of the parish of Auchtermuchty, with power to the commission *finally* to determine every question with respect to that settlement that should be brought before them,) the commission did *REVERSE* the sentence of the synod, and appointed the presbytery to proceed to the settlement of the presentee; and accordingly, *after due trial taken of his qualifications, Mr. Moncrieff was, upon the 19th of April 1734, solemnly ordained a minister of the gospel, and admitted to serve in that function in the parish of Auchtermuchty.*

“ The presbytery of Cupar having thought fit to complain to the General Assembly 1734, of the procedure of the commission, they were pleased, by their sentence of the tenth of May 1734, to reverse the settlement of Mr. Matthew Moncrieff as minister of Auchtermuchty.

“ That the patron being thus deprived of his right of presentation by the church, though it is, and must be admitted, that he presented a qualified person—the presentee was found qualified and lawfully ordained by the proper court, and his ordination has not been called in question—yet he did not incline to prosecute his right in the civil court, without once more trying the church judicatories, and therefore a new presentation was offered to the presbytery, in favours of Mr. Matthew Moncrieff; but the presbytery thought fit to refuse to receive it, or allow it to be marked in their minutes, but proceeded to take trials of Mr. Maxton, in order to his settlement upon the call given to him by some of the heritors and elders, *WITHIN six months of the vacancy*; and Mr. Moncrieff having applied to your Lordships by *advocation*, that the settlement might be stopt, until the patron’s civil right might be tried, your Lordships sisted the presbytery’s procedure; and though the sist was duly notified to them, they thought fit to proceed, and settled Mr. Maxton minister of Auchtermuchty.” In consequence of the presbytery’s proceeding in the face of the sist, a petition and complaint was presented to your Lordships against them, when certain of their number appeared at the bar and apologized for their proceedings.

Mr. Moncrieff was advised that, in respect of the presbytery’s having refused to receive his qualified presentee, upon a presentation duly tendered, he was entitled to the whole fruits of the benefice, and therefore he presented a bill of *suspension*. Mr. Maxton, who was ordained by the presbytery, upon a call in the face of the patron’s presentation, undertook the defence of the presbytery’s proceedings, and agreed to discuss the patron’s reasons of

suspension upon the bill. The cause was therefore heard before Lord Haining, Ordinary, by whom it was reported to the court on informations. On advising which, the court pronounced this interlocutor, to the terms of which I request your Lordships' particular attention.

The court, (Feb. 14, 1735,) found, "that the right to a stipend is a civil right: and therefore *that the court have a power to cognosce and determine upon the legality of the admission of ministers, ad hunc effectum*, whether the person admitted shall have right to the stipend or not."

Well then, the *jurisdiction* and *power* of your Lordships being thus established, memorials were ordered upon *the legality of the proceedings of the church courts, whereby the presentation in favour of Mr. Moncrieff was rejected*. The memorial for Mr. Maxton contains an argument on the supposed *power of the church and right of the church courts*, in relation to the admission of ministers, which, considering the judgment which the court afterwards pronounced, is very applicable to this case, in particular the following passage.

"And 'tis an ancient rule in their Books of discipline, and a very reasonable one, *that no minister should be intruded upon a congregation against its will*; for that is reckoned an evidence his gifts are not edifying to it: And that is still a rule, and there is no law condemns it; on the contrary, this discipline of the church is ratified by the Union, and *in terminis* declared in the foresaid act 1719, as to this article of it, the judging of the qualifications of the presentee; and in the present case, *THE CONGREGATION, AT THE MODERATION OF A CALL, WERE AGAINST THE PRESENTEE, AND THEREFORE HE WAS NOT ACCEPTED OF. THE MODERATION OF A CALL IS A TRYING THE PRESENTEE IF HIS GIFTS BE EDIFYING TO THE CONGREGATION, WHICH THEY BY THEIR VOTES DECLARE. IT IS A TRIAL OF HIS QUALITIES WITH RESPECT TO HIS FITNESS OR UNFITNESS FOR THAT CHARGE.*

"Upon receiving the report of the moderation in a call, the presbytery, on the 17th of July 1733, found there was a very harmonious call to your memorialist, viz. from the whole elders, a great plurality of heritors, the whole Town-Council of *Auchtermuchty*, with the *approbation* of all the congregation; and therefore *sustained* the call to your memorialist. They neglected the call to the presentee, because few voted for him; which is in effect, *finding the presentee unqualified for that parish*. The Synod of *Fife* affirmed the sentence of the presbytery; the commission reversed this sentence of the Synod, and the last General Assembly reversed the sentence of the commission; that is, *they rejected the presentee as unqualified for this parish, upon the evidence of the parish its thinking him so, by*

“ *their voting for another at the moderation.* That this was the reason of the presbytery, the synod and the assembly’s setting aside the presentee, is evident from the foresaid minute of presbytery, from the answers to the reasons of appeal against the Synod’s sentence, and from the complaint upon the commission to the assembly. ’Tis true, there was objection to the patron’s right too; *but still the grand reason for setting the presentee aside, was the declared mind of the parish against him at the moderation.*”

On advising the argument for Mr. Maxton, in defence of the supposed rights of the church, and of the proceedings of its judicatories, in rejecting Mr. Moncrieff’s presentee, or rather in ejecting him after he had been settled, the court pronounced an interlocutor, Feb. 15, 1735, finding, ‘ *That presbyteries refusing a presentation duly tendered to them in favour of a qualified minister, against which presentation or presentee there lyes no legal objection; and upon admitting another person to be minister, the patron has right to retain the stipend, AS IN THE CASE OF A VACANCY: And, therefore, finds the reasons of the suspension relevant.* And supersedes advising the other points in the cause till Tuesday next.” The nature of the other points superseded will sufficiently appear from the next interlocutor which was pronounced on 22d Feb. 1735, which is in these terms: *Repell the objection that the right of “ patronage was not produced before the presbytery within the six months after the vacancy commenced, in respect of the answer: That the same was produced before the commission in the appeal to which the presbytery were parties, before the settlement of the church and the charger’s admission.”*

Against all the *three* interlocutors which I have quoted, Mr. Maxton presented a reclaiming petition, which was drawn by Mr. William Grant, who was then I believe, procurator for the church, and afterwards Lord Prestongrange, in which it is stated, that the judgments brought under review, had been “ pronounced after very full debate among your Lordships; and though the court was not unanimous, it was far from being equally divided.” On being advised with answers the petition was refused.

Now I humbly submit, first, while it is established by the case of Auchtermuchty, that the proceedings of church courts cannot be reviewed in the civil courts by a direct process of advocacy, that case equally establishes the *jurisdiction and competency*, by means of a process of suspension of the civil court, to *cognosce and determine upon the legality or illegality of the admission of ministers as to all patrimonial effects.* The form of action may vary according the circumstances of the particular case. But the question put to the civil court, in whatever form of action, must always be, whether *the act complained of is or is not a violation of*

the patrimonial rights and privileges of the patron and presentee? That question can be entertained in a process of suspension of a threatened charge to the heritors at the instance of a party inducted against the patron's right, by the patron, the party inducted appearing to vindicate the rights of the church, and defend the acts of her courts. The presbytery, it is true, were not parties in the case cited, just because they had gone so far as to give to another the title and interest to defend their acts if he could, and to whom all pleas competent to them were equally competent. In the *second* place, your Lordships will observe that the process of suspension was held to be competent, though raised directly from the illegal sentence of the Presbytery. It was not held any bar to it that the patron had not followed forth his appeal to the Synod and General Assembly. In the *third* place, The first judgment fixed the jurisdiction and power of the civil Court "*to cognosce and determine upon the legality of the admission of ministers,*" quoad the benefice, or patrimonial right anywise involved in the act of admission, or refusal to admit, to the office and benefice by the church courts. The suspension related to a threatened charge for payment of stipend only; but the *principle* of the judgments extends equally, though it required a different form of action, to the other civil rights of the patron and presentee. In the *fourth* place, The second judgment finds, that there was a presentation duly tendered in favour of Mr. Moncrieff, a licentiate of the Church of Scotland and "qualified presentee:" That as there lay "no legal objection" to him, or to the presentation, *the act rejecting him* was illegal, as was also the act admitting another to the living, and therefore (and the Court could go no farther under the form of action,) "the reasons of suspension were found relevant." In the *fifth* place, Though the church courts not only rejected the patron's presentee, but went a step farther, and inducted another person upon a call by the congregation, the farther step was immaterial to the question of interference with the rights of the patron and presentee. It was by the act rejecting the presentee that the wrong was done to him and the patron. To them it matters not to whom the stipend was given, if it was illegally withheld from the presentee. The church, it is conceded, may ordain another to be minister of the parish, and your Lordships cannot touch the act of ordination. But you can judge of all the circumstances, and determine if he is to have also right to the benefice. You can adjudge the rejection of the presentee to have been illegal. If the church refuse to take him upon trial, you can ordain them to do so, though you cannot control the exercise of their judgment. That is a matter of conscience. But to try the legality of the rejection, you can consider every step of the procedure in the process of conferring the pastoral relation. The question of jurisdiction is necessarily raised by the

review of the statutes, and it is upon a due consideration of their provisions that it must be determined. Has there, or has there not been a violation of the patrimonial rights of the pursuer? If you are satisfied that there has, then you have jurisdiction to give the redress which is sought. On the other hand, if there was no infringement of their rights, and no excess of power, then your Lordships have no jurisdiction in the matter. In the *sixth* place, The defenders say, that in this case you have no jurisdiction, because they sustained the presentation, and all the procedure subsequent to that, was of a spiritual nature. But that is just begging the question. I deny that any part of the process is spiritual in its nature, but the act of ordination. All the rest is power conferred by civil statute. It is by statute alone that presbyteries give collation upon presentations. Their right to present *jure devoluto* is a statutory right, and it can only be exercised by the defenders on the supposition that, by a legal sentence, they have found Mr. Young *not qualified*, while, in point of fact, they never saw him. What is it but denying legal effect to a presentation, to reject a presentee without making trial of his qualifications for the office? If the presbytery sustain a presentation, they are also bound to go on and discharge their duties by giving full effect to it, and if they refuse to proceed, what is the meaning of such refusal, but denying effect to the right? In the *last* place, The reasoning of Mr. Maxton, (or of the church) which your Lordships repudiated in the case of Auchtermuchty, was just the line of argument and defence now maintained, in order to exclude the jurisdiction of this court, and its right to inquire into and determine any thing done by the church courts, in the course of the process of settling a presentee to a parish. Mr. Maxton maintained, 1st, That on *all matters* relating to the examination and admission of ministers, the sentences of the church courts are *conclusive*, and not subject to review by any civil court. 2d, That the church is *absolute* lawgiver as to the requisite or *proper qualifications* of ministers. 3d, He founded on the rule of the Book of Discipline, that no minister be intruded on a congregation against its will, its *will* being evidence that his gifts are not edifying—or, in other words, that he was not *meet* for the office. 4th, He founded on the circumstance of *A Call* being a necessary trial of the presentee's qualities or fitness for the particular charge, and that the presbytery had a right to reject the presentee, because so *few voted for him, which was in effect finding him unqualified for that parish*: “That the grand reason for setting aside the presentee, *“ was the declared mind of the parish against him at the moderation.”* All these reasons, however, were unavailing; and your Lordships (there being only *two* judges in the minority,) asserted your power and right to judge of the legality of the admission of ministers *quoad temporalia*; and then further adjudged that *the*

rejection of a presentation by a presbytery to whom it is *duly tendered* in favour of a *qualified presentee*, against whom there lies no legal objection, is illegal, and entitles the patron to obtain redress in the civil court, for the injury done to his patrimonial rights, according to the circumstances of the particular case.

Now, keeping these remarks—the terms of the judgments in the case of Auchtermuchty and of the acts of parliament—in view, your Lordships will be pleased to attend to what it is the pursuers ask, and what they maintain your Lordships have jurisdiction to decree, under the conclusions of their summons. They do not seek more *at present*, than to have *their rights* under the particular deed of presentation—the obligations incumbent on the presbytery with reference to that deed—their failure to discharge their duty—their obligations still to try Mr. Young's qualifications, and receive and admit him as minister of the church and parish of Auchterarder if qualified for that office—judicially found and declared: and farther, that the rejection of him, without trial being had of his qualifications, or any objections stated thereto, but expressly on the ground of the *veto* of a certain portion of a certain class of the parishioners, was illegal and injurious to their patrimonial rights, and contrary to the provisions of the statutes and laws libelled. If the *illegality* of the act of the presbytery rejecting Mr. Young, be declared by the court, the pursuers are entitled to assume that, without obliging them to have recourse to further measures, the defenders will retrace their steps, and repair the injuries they have done so far as in their power. I am bound to assume that the presbytery will obey the decree of your Lordships, if it shall find that what they have done is illegal. The pursuers *might* have concluded that the presbytery should be *decerned and ordained* to ordain and admit Mr. Young, and that it should be found also that the *jus devolutum* had not fallen to the presbytery. But the question is *not* what the pursuers *might* have concluded for, or what steps they may still have it in their power to take—it is whether they have not set forth a sufficient title and interest to obtain, and that your Lordships can competently pronounce, a decree in terms of the different branches of the declaratory conclusion of their summons. It is not pretended that the presbytery are not the proper parties to vindicate their own acts, which the pursuers allege to have been illegal and in violation of their patrimonial rights, as well as to show, if they can, that they are *not* bound and astricted *still* to try Mr. Young's qualifications, and to receive and admit him as minister of the parish of Auchterarder, under the deed of presentation which was received and sustained by them.

It was considered more decorous and respectful to the presbytery not to press for any further decerniture against them at present; assuming, as I am entitled to assume—on the right; of the

pursuers being judicially declared, on the one hand, and the obligations and duties by law imposed upon the presbytery, and the illegal violation of them by the presbytery, on the other—that full effect will at once be given by them to the judgment of your Lordships.

The next case, is that of *Hay v. the Presbytery of Dunse*, 25th February 1749. (M. 9911.) The circumstances were these:—Hay of Belton had right to the patronage of the church and parish of Dunse by disposition from Hay of Drumelzier to the late Lord Blantyre, and the then Lord Blantyre's retour and disposition. Belton presented to the parish, on the 27th August 1748, Mr. Dickson, *probationer*, by whom the presentation was accepted.

The presbytery of Dunse doubted Belton's right, alleging that he was only trustee for Drumelzier, who had not qualified by taking the oaths to government, and so was not entitled to present; whereupon Belton deponed in their presence, that he was not a trustee, but had the title for life, and had executed a deed obliging his heir to denude.

The presbytery, on Dec. 6, 1748, appointed a *moderation in a call* on 23d January 1749, for supplying the vacancy; *thereby rejecting the presentation and presentee* without finding him *disqualified*.

Belton appealed to the Synod, *pending which he insisted in a process of declarator before this court against THE PRESBYTERY OF DUNSE*, to the effect, 1st, That he was patron of the parish; 2d, That he had presented in due time a *qualified person*; 3d, That the presbytery had no right to present *tanquam jure devoluto*. The presbytery, on the other hand, maintained, 1st, That they were not the proper contradictors in a question of disputed right of patronage, and that a decree of declarator *against them* would not be available against the *heritors* liable in stipend, or against the crown, or other competing patron. 2d, That by the act 1567, the admission and examination of ministers were declared to be in the church, and that a presbytery or other church judicature, could not be ordained to admit a presentee, or shew cause for their refusal. 3d, That Belton was merely a trustee for Drumelzier, who never having taken the oaths to government, was therefore not qualified to present. To which grounds Belton answered, 1st, That the object of the action was to establish the patron's right against the presbytery, who by the law became patrons if he failed to present within six months. 2d, That the act 1567, while it gave the church the power of examination and admission of ministers, if found qualified, gave them no right to settle any other man than the presentee, who should have right to the stipend; that the process did not hinder the church from rejecting the presentee *upon trial*, neither could it prevent them from ordaining another on the face of the presentation. 3d, That Belton's oath, that he was not trustee for Drumelzier, was enough. The

court, Feb. 15, 1749, "repelled the objections made to the pursuer's right, *and to the person by him presented*, on account of "his not having taken the oaths before his first licence, in respect "of the answers; and found, that the pursuer had *in possessorio* "sufficient right to present, *and that the right has not fallen to* "the presbytery *tanquam jure devoluto, and decerns and* "declares."

Against this interlocutor a reclaiming petition was presented by the presbytery of Dunse, in which they prayed your Lordships, as I find from the session papers, to find, "1st, That *no action is* "competent before your Lordships for reversing the judgments of "a church judicature in the settlement of a minister in a vacant "parish. 2dly, That a declarator of a right of patronage, against "a presbytery or synod, is not properly brought, and that the "presbytery and synod are not proper defenders in such an action. "3tio, That *the qualifications* of a presentee to a vacant church "are not the proper subject of a declarator before a civil court in "Scotland. 4to, That it is not competent to your Lordships to "grant an injunction to the church judicatories in Scotland not "to settle a minister in a vacant parish; and therefore to assoilzie "the presbytery of Dunse from the present declarator." The court, however, adhered to the interlocutor of the Lord Ordinary. According to Lord Monboddo's report, (supplement vol. 5, p. 768,) there were two conclusions in the summons, "which the Lords "did not meddle with. The one was, that the stipend did belong "to the patron till the presentee was settled. This the Lords did "not think competent to be declared against the presbytery, who "never could have any right to the stipend. The other was, that "the presbytery ought to be discharged to moderate a call at large, "or settle any other man; because that was interfering with the "power of ordination, or the internal policy of the church, with "which the Lords thought they had nothing to do."

It is evident that, against the presbytery (and there were no other parties defenders,) no *petitory* conclusion could be entertained in regard to the stipend. Nothing of the kind is attempted in this case. But with deference, it is absurd to say, that the presbytery could not defend the temporal rights of the benefice while vacant. They do so in processes of valuation, and the like, daily. Neither is it sought here to be declared that the presbytery shall not exercise their proper legal functions as a church court, in relation to the presentation or calling of a person to be minister of Auchterarder. It is by their acts that they are to be judged; and the pursuers shall take what course it may be competent for them to pursue, in the event of the acts of the presbytery being illegal, and in further violation of their patrimonial rights. It was laid down on the bench, in the case of Dunse, "that pa-

“tronage, (being a civil right,) *might be declared*, as it might also
 “that the patron had presented in due time, *in which action the*
 “*presbytery were the proper contradictors.*” The case was taken
 by appeal to the House of Lords, and it appears, from the report
 in Craigie and Stewart, p. 478, that their Lordships directed the
 appellant’s counsel “to apply themselves particularly to the *proper*
 “*parties in this cause; and counsel on both sides were heard*
 “*thereupon; and due consideration being had of what was offered*
 “on either side in this cause: it is declared, &c. that his Majesty’s
 “advocate for Scotland *ought to have been made a party to the*
 “*action of declarator brought in this cause; and therefore or-*
 “*dered and adjudged, that the several interlocutors complained*
 “*of in the said petition of appeal be reversed.* And it is hereby
 “farther ordered, that the respondent do make his Majesty’s
 “advocate a party defender in this process; and also be at liberty
 “to bring such other parties before the court *as he shall be ad-*
 “*vised; but this order to be without prejudice to any exception*
 “or objection which may properly be taken or made to the juris-
 “diction of the Court of Session, touching any of the matters in
 “question in this cause.”

All the proper parties not being in the field, in so far as related
 to the right of patronage, the interlocutors pronounced by your
 Lordships behoved to be recalled; and it was farther necessary
 that there should be reserved to the parties to be called, all proper
 objections to the jurisdiction of the court or otherwise. Still your
 Lordships see that the judgments of this court were not reversed
 on the merits, and that it was conceded on all hands that the
 presbytery were the *proper contradictors* in the declarator, as to
 the patron’s having duly exercised his right within the limited
 time, and *in favour of a qualified presentee*—just as the presbytery
 of Auchterarder in this case are the proper parties against whom
 it should be declared in terms of the first conclusion of the sum-
 mons. If we are right in our interpretation of the statutes, then
 the patrimonial interests of the pursuers, and the relative duties
 and obligations of the church court are clear, and the jurisdiction
 of your Lordships beyond all exception. In the case of Dunse,
 it was said that the stipend could not properly be declared to be-
 long to the patron, because the presbytery were the only defenders;
 and it was on that very account that the heritors, and trustees of
 the Widows’ Fund, are parties here, in order that, when the conclu-
 sions for the stipend shall be proceeded in, after the first general
 declaratory conclusion is disposed of, they may be heard for their
 interest.

The third case to which I have to refer is *Cochrane of Cul-*
ross v. Stodart, 26th June 1751. (M. 9951.) The second charge
 of the parish of Culross having become vacant in 1746, Cochrane

of Culross presented thereto Mr. Trotter, *probationer*, who accepted. The presentation and acceptance were intimated on 4th May, and produced to the presbytery on 4th June 1747. On 1st July there was produced a charter of the patronage of the kirk of Culross, which had formerly belonged to Erskine of Carnock, dated 12th February 1747. Neither Mr. Cochrane's author, nor his predecessor, had presented either first or second ministers; but Colonel Erskine, the disponent's father, had, as patron, disposed of the vacant stipends. It was objected before the presbytery, by the heritors, magistrates, and kirk-session, 1st, That Mr. Cochrane had no valid title to the patronage, which had at one time belonged to the Abbey and had been granted to Lord Colville. The objectors pretended to no right themselves. 2d, They alleged that the second charge of the second minister was by an agreement, concluded in 1648, vested in delegates to be chosen by the contributors. The objectors, therefore, alleged there was no valid presentation, and craved the presbytery *to moderate in a call, which they did*. The call was given to Mr. Fairnie and approved of by the presbytery. Mr. Cochrane appealed to the synod against the sentence, which the synod affirmed, as did also the General Assembly in May 1748. Mr. Fairnie declined the charge, and a new call was therefore given to Mr. Stodart, which the presbytery approved of, and they settled him as minister, at the sametime *rejecting Mr. Cochrane's presentee*. After the call to Mr. Fairnie was approved by the presbytery and synod, Mr. Cochrane instituted *an action of declarator of his right*, as patron *of this church*, against The Officers of State, heritors, and magistrates and town-council of Culross. He was ultimately preferred in the declarator; and then he pursued the heritors for payment of their stipends, *as having timeously presented Mr. Trotter, a qualified presentee*. The heritors raised a process of multiplepinding, as the heritors of Auchterarder have done, and they called as parties the patron and Mr. Stodart, the minister admitted by the presbytery upon a call in the face of the patron's presentation to Mr. Trotter.

The patron's right to the stipend for the period *prior* to Mr. Stodart's admission was yielded; but as to the stipend *after* that period, Mr. Stodart contended, that "being ordained and admitted minister of this charge by the presbytery of the bounds, and their conduct justified by the superior church judicatories, who are the ultimate judges in all questions of this nature, it behoved to rest there, and no civil Judge could give relief;" and he founded upon the concluding sentence of the act 1567, as had been done in the case of Auchtermuchty, which was largely founded upon in the course of the discussion. Mr. Stodart likewise took the objection, which had been taken in the case of Auch-

termuchty, that Mr. Trotter, the presentee, being only a *probationer*, was not qualified in terms of the statute 1592, which refers only to the presbytery's refusing to admit ane qualified "minister." The Court found, that *the patron having presented in due time a qualified minister, whom the presbytery ought to have admitted, or found not qualified, had right to the fruits of the benefice, notwithstanding the settlement of Mr. Stodart, and that aye and until the vacancy should be legally supplied.* Thus, your Lordships again found that you have jurisdiction and power to judge of the sentences of the church courts, or as to the legality of the admission of Mr. Stodart, and rejection of Mr. Trotter, the patron's presentee, as to all civil or patrimonial effects. The form of action was a multiplepoinding; but, as in the case of *Auchtermuchty*, the power of the church, and legality of the proceedings of the church courts, were attempted to be vindicated by Mr. Stodart, who had been ordained and inducted, as the court found, in violation of the patron's rights. The heritors made no appearance.

The next case is that of *Lanark*.—*Dick v. Carmichael*, 29th July 1752, M. 9954, Elchie's Patronage, No. 6. Dr. Dick was presented by Lockhart of Lee to the church and parish of Lanark in 1748. He was not acceptable to the magistrates, who in consequence, obtained a presentation from the crown in favour of another person. That obliged Mr. Lockhart to bring a process of declarator against the crown, of his right to the patronage, in which action he was ultimately unsuccessful. As the process was keenly litigated, the church courts deemed it to be their duty *not* to abide the issue, but, during its dependence of the process in the civil court to proceed with the settlement of Dr. Dick, as the person presented by the patron in possession, and who at the time appeared to them also to have the best right.

After the civil process was determined against Lockhart of Lee, and setting aside also the settlement of Dr. Dick *quoad temporalia*, though it did not attempt to touch his ordination to the spiritual office, the factor for the crown pursued the heritors of the parish for the past as well as the prospective stipend *as vacant*, notwithstanding the continuance of the pastoral relation formed by Dr. Dick's *ordination* as minister of the parish. The heritors insisted in a process of multiplepoinding, calling, as parties the crown and Dr. Dick. The former maintained right to the stipend as part of the fruits of the benefice, in consequence of the wrongful rejection of the king's presentee. Dr. Dick, on the other hand, founded strongly on the fact of their being *competing presentees*.—That, in the case of a *single presentee*, (as in this instance) "the presbytery cannot overlook a presentation, and set-
"tle a church by a popular call, which would be a gross contempt

“of the laws of the land”—That such was the case of *Culross*. But where there are *competing presentees*, the act 1592 did not apply, because the church courts were bound to settle the parish, and to judge in the competition as they best could, and therefore their error in judgment could not have the effect to annul a settlement regularly made. The Court of Session by the narrowest majority preferred Dr. Dick to the stipend that had fallen due since his admission, and in time coming, during his incumbency. But the judgment was reversed in the House of Lords, on 2d March 1753.

The parties in that case were the same as in the case of *Culross*, and the power of the civil court to try, *quoad temporalia*, the legality of the presbytery's procedure, in the process of settlement of a minister, was undoubted. The main difficulty arose from their being competing rights of presentation and presentees, and whether it was the duty of the presbytery to proceed instantly with the settlement of either presentee, or to abide the issue of the civil question of right to the patronage. Ever since the decision of the House of Lords in that case, the church courts have, in cases of disputed rights of patronage, refused to proceed in the settlement until the issue of the civil question, and on very substantial grounds. For if, on the one hand, the act of settlement, *quoad temporalia*, could not be annulled by the civil court, the right of the most undoubted patron of a parish might be annulled on the pretence of another that he had a better right, and who therefore issued his presentation also, to which the presbytery would perhaps give effect, through error or inadvertence, rather than to the deed of the true patron. The judgment in the case of *Lanark*, however, clearly marked the limits of the power of the church courts. They might ordain a wrong presentee. The spiritual relation constituted by the spiritual act of ordination, the civil court could not unloose. But the act of induction or settlement to the benefice it could and did annul. And such being the ascertained power of the civil court, it would, on the other hand, be doing injustice to a presentee, where there is a competition of the right of patronage, to proceed in the settlement before the decision of the question of right, because of the risk he would run in being left, as Dr. Dick was, the minister of a parish but without any right to the benefice.

In the case of (*Kiltarlity*) *Bailie v. Morison*, 28th February 1822, (F. C. and 1 Shaw's Reports 363) your Lordships “Found
“it competent to entertain a suspension of the proceedings of a
“presbytery relative to the validity of a presentation by the pro-
“testant commissioner of an alleged papist patron, as the ques-
“tion regarded the civil right of patronage; but found, that the

“suspensers, being elders, heritors, parishioners, &c. had *no title to pursue.*”

I submit that these precedents establish, while your Lordships cannot *directly* review the proceedings of the church courts *by advocacy*, so as to convert the civil court merely into a court of review, that wherever the church courts exceed the powers vested in them by law, in relation to the patrimonial rights of patrons and presentees, your Lordships can, by suspension and interdict, or by declarator, or other competent form of action, according to the circumstances, interfere and give redress—more particularly, that you can competently take cognizance of *the grounds* of the sentences of the ecclesiastical courts in all matters of patrimonial right, and, *to that effect*, can judge of and determine the legality of the admission, or of the rejection of ministers, by the ecclesiastical judicatories.

I shall not detain your Lordships by quoting the reports, but you will find in the following cases strong analogous authority for the principles for which I have been contending. Under the statute 43 Geo. III. c. 54, presbyteries are the judges in all matters relating to the qualifications, admission, and extrusion of schoolmasters; and their sentences are declared to be final, and not subject to review, either by the superior ecclesiastical courts, or by the civil courts. Nevertheless, where presbyteries *exceed their powers*, or depart from the proper line of their duty, or even act irregularly, it is competent for your Lordships to give redress to the party aggrieved, by setting their sentences aside. *Ross v. Findlater* 2d March, 1826, (4 Shaw, p. 514.) *Brown v. Heritors of Kilberrie*, 1st February 1825; and in *House of Lords*, 12th June 1829, (3 W. and S. p. 441.) *Mathieson v. Dunsmuir*, 16th December 1829, (Shaw, p. 252.) *Rutherford v. the Presbytery of Kirkcaldy*, 17th November 1785—(M. 7469.)

I have now only to advert, and I shall do it very briefly, to three minor objections pleaded by the defenders: First, They say the action is incompetent inasmuch as all that the pursuers seek to have found and declared under the first conclusion of the summons, is either merely abstract law, or abstract fact, and does not embrace any patrimonial claims of right on the part of the pursuers. But that is an entire mistake.

What the pursuers ask, is not a *general declaration* of the rights of patrons, or declaration of mere “abstract facts.” The title and interest set forth have reference to a *particular deed* granted by a patron, being an actual exercise of an undoubted patrimonial right, in favour of a qualified presentee, in whom those rights, or a portion of them at least, are vested *by the particular deed*. The summons exhibits a sufficient title and inter-

est in the pursuers, *apart altogether from any of the mere pecuniary conclusions* which might, as a sequence of the declarator, be competently directed either against the heritors of Auchterarder, or any other parties. And your Lordships are aware, that it is not necessary, in order to render a process of declarator *competent*, that it shall contain any other conclusion whatever. Persons have often *an interest* to declare acts legal or illegal, without at the same time, or in the same action, insisting in any accessory or pecuniary conclusions. So far from such conclusions being essential to render a summons of declarator competent, the course of procedure seems to have been the very reverse. There are whole classes of declaratory summonses wherein no petitory conclusions are usually inserted: such as declarators of marriage, and putting to silence, legitimacy or illegitimacy, or that powers competent to a party under deeds of entail have been validly exercised, and the like. In treating of the division of actions, Lord *Stair* says, (4. 3. 47.) “Declaratory actions are those wherein *the right of the pursuer is craved to be declared, but nothing is craved to be done by the defender,*” “And such actions may be *pursued for instructing and clearing any kind of right relating to liberty, dominion, or obligation.*”

This case is just the converse of the cases of *Gifford v. Trail*, 8th July 1829, and *Lyle v. Balfour*, 17th November 1830, cited by the defenders. In the case of *Gifford*, the conclusion of the summons was to have it declared, that the whole lands in the islands of Orkney and Shetland have, since their annexation to the kingdom of Scotland, *formed one stewartry*. But there was *no interest* set forth by the pursuers, to have *that abstract fact* declared. It was not in vindication of any patrimonial right alleged to have been infringed that the action proceeded. And in the case of *Lyle*, again, the conclusion attempted to be maintained, was the abstract fact, *that a certain person was a trustee*, but without alleging any competent right to the pursuer from that fact being declared. If it had further been concluded that the trustee was *liable to account* even to the smallest extent, that assertion would have been sustained as a sufficient interest to insist in the action.

I may in passing, just notice what the defenders say is “*a per-
fect test,*” whether an obligation can competently be declared, which, they say, is to be found in the question, whether the Court could competently *enforce the obligation*? If specific implement cannot be enforced, the obligation itself, or its violation, cannot be declared. If your Lordships, for example, cannot compel the presbytery *to ordain* the presentee, therefore, it is maintained, that the rejection of him without trial, and on grounds the most illegal and unwarrantable, cannot *competently* be declared by

the Court. I submit, that the supposed perfect test is no test at all and altogether imaginary. Indeed, if it were a true test, it would lead directly to this conclusion, that there would be a wrong without a remedy. Do the defenders really maintain, if the illegality and injurious nature of their acts were judicially declared in terms of the conclusion of this summons, that no redress would or could competently be afforded? The powers of the Court, I maintain, do enable your Lordships to decree implement of the obligations incumbent by the statute law of the land on the defenders, and that, either by doing what they ought to have done at first, or by repairing the *injury and damage* which their refusal would *personally* subject them in. The power to enforce *specific implement* of an obligation is not a true, far less a perfect test of the *competency* of declaring an obligation, inasmuch as specific implement is often impossible by the time the obligation has been judicially declared, or the action raised. Nevertheless, many consequences may, either directly or indirectly, follow from the declaration. And though specific implement cannot be obtained or enforced, *reparation* and damages can be awarded as a consequence of the declaration of the obligation and the illegal violation of it. Can your Lordships not declare a person to have been married to a woman, because, forsooth, from his death, specific implement of all the marital obligations could not still be enforced? The ultimate and full effect of the decret is not the test of competency. All that the pursuers are required, in a summons of declarator, to set forth, is *a sufficient title and interest* in the right, obligation, or deed, or in the acts, sought to be declared. Whether he can or will receive implement of all that he has set forth is not a consideration on the question of *competency* at all. The summons might farther have concluded for a decret of declarator, that the *jus devolutum* had not opened to the defenders;—they might also have sought a decret to ordain Mr. Young minister of the parish. But these additional conclusions are not necessary to render the action competent with the leading conclusions which it now contains.

Next, it is said, that the pursuers have no right to pursue. That the *patron's* right to retain the stipend, under the act 1592, c. 117, has by the statute 54 Geo. III. c. 169, been transferred to the trustees for the Minister's Widow's Fund. And that the *presentee* has no *interest* to pursue, because he has no *title* to the fruits of the benefice without induction. To these pleas, I answer, that the patron of a parish and his presentee *in whose favour a presentation has been sustained*, have other patrimonial rights besides the fruits of the benefice. The *office* is one of dignity and trust. And *the rights* to it which are conferred by the deed of presentation, may, from their nature, be competently de-

clared, and the obligations incumbent on the presbytery enforced, even though the incumbent should neither obtain manse, glebe, stipend, or any other mere pecuniary advantage. And I must be permitted to say, that it is a strange doctrine to be maintained by a presbytery of the Church of Scotland, that a *presentee* has no *rights vested in him* by a deed of presentation, *excepting a pecuniary interest*—or no interest to insist in a declarator of *his rights* under a deed of presentation. Why, his connexion with the church and parish depends entirely on the rights conferred by that deed. He can neither acquire the ecclesiastical status of minister, nor the fruits of the benefice without it. It matters not whether the presentation flow from the sovereign or a subject, it is by means of it that a presentee acquires the ecclesiastical status of an ordained minister of the Church, as well as certain patrimonial rights. I am entitled in this part of the argument to assume, that the rejection of Mr. Young was *ultra vires* of the presbytery, and consequently illegal. And it is immaterial whether the particular ground of rejection was the *veto* of parishioners, or a refusal by the presbytery to act upon or obey the presentation at all. It is therefore of little consequence to consider, *hoc statu* at least, whether the pursuers, or either of them, can ever succeed in obtaining decret for the stipend. That question necessarily *depends* on the adjudication of the declaratory conclusion. For if the pursuers are *wrong* on the merits of that conclusion, no question can then arise either betwixt them and the trustees of the Widow's Fund, or the heritors of the Parish liable in payment of stipend. The interest of both pursuers will then be excluded. On the other hand, if the pursuers are *right* in the declaratory conclusion, in that case they will doubtless have right to the stipend and other emoluments of the benefice; at least the competition will only then properly arise betwixt them and the trustees of the Ministers' Widows' Fund. The interest of the presbytery will then be wholly superseded. It is *jus tertii* to them to maintain the plea of the Widows' Fund. The right of the trustees is said to arise from the death or resignation of the minister, and consequent vacancy of the parish. But if the pursuers are successful, under the first conclusion against the presbytery, they hope to satisfy your Lordships that this is a case to which the statute conferring a right to "*vacant stipends*" on the Ministers' Widows' Fund does not apply; inasmuch as there is *no proper vacancy* in the sense and meaning of the statute, and that *vacant stipend* and a *vacant parish*, from whatever cause the vacancy in the parish may arise, are by no means one and the same thing. Neither is it necessary or proper here to inquire, whether, if the patron did establish a right to the funds of the benefice, he be entitled to transfer them to the presentee. These are questions pressed by the de-

fenders into the discussion, I humbly think, very unnecessarily, and by a party who has no direct interest in their decision one way or another. Besides objecting to the competency and to the want of interest on the part of the pursuers to insist in the action, the defenders maintain, that the pursuers are barred *personali exceptione*, from insisting in the action by *acquiescence* in the proceedings of the presbytery, in so far as they acted under the interim act and the regulations of the Assembly.

In the *first* place, no plea to this effect is stated in the record. In the *second* place, though it had been stated, it is groundless.

The Earl of Kinnoull was no party to any proceedings in the church courts *after* the presentation in favour of Mr. Young was sustained by the presbytery. In that act, and in the presbytery's declaration, that they were to "proceed in the usual way to moderate a call to Mr. Young," the procurator who attended for the Earl of Kinnoull acquiesced. His lordship had no interest to do otherwise. Neither had the presentee any interest to object to the presbytery's acting upon the regulations of the Assembly so far, because there is blended in those regulations what no presentee or patron can object to. The *act of rejection* of the presentee, on the *admitted ground of the exercise of a veto by some of the male heads of families in the parish*, is the illegal act by which the pursuers allege their rights to have been infringed. But in that act it is not pretended that there has been any acquiescence. Besides, so far from acquiescing in their whole procedure, a protest was taken at almost every step by the agent for the presentee. In particular, when upon a division it was carried at the meeting of 2d December 1834, that the presbytery *do proceed in terms of the regulations*, a protest against the sentence was entered. And again, when the presbytery allowed the male heads of families to exercise the *veto*, and again, when they found that a majority of the persons on the roll had dissented, another protest was taken. There was therefore not only no acquiescence in the acts of the presbytery which led to the rejection of the presentee, or to the sentence of rejection itself, but the very reverse. But though, from beginning to end of the proceedings in the church courts there had been no protest, that, I submit, would not have prevented the pursuer from maintaining the present action. They might have deprived themselves of the right to obtain a review of the proceedings of the presbytery in the higher church courts; but their mere silence could not have any other or greater effect in depriving them of the right to vindicate their patrimonial rights in the civil court.

The last plea maintained by the presbytery is that, even if they did exceed their powers, and act illegally in the matter, the pursuers are barred from pursuing this action, in consequence of not

having taken and followed out an appeal from the sentence of the presbytery to the synod and General Assembly. And they refer to the case of *Cook v. Milne*, 17th May 1823, (S. 2, p. 317,) which was a case under the post-horse duty statute, which prescribes an appeal from the ordinary sessions of the peace to the quarter sessions for the county. Instead of taking that appeal, Cook presented a bill of suspension to your Lordships, which was objected to as incompetent, and the objection sustained. The presbytery of Auchterarder likewise refer to the case of *Alexander v. Seymour*, 2d December 1828, (S. 3, p. 117,) which was a question under the statute 10th Geo. II. in regard to "common players of interludes," and for the recovery of penalties for performing, without a licence, any "tragedy, comedy, opera, play, farce, or other entertainment of the stage." The statute provides, that the penalties may be recovered before two justices of the peace, with a power of appeal to the quarter sessions. As in the case of Cook, Alexander did not appeal from the sentence of the justices to the quarter sessions, but brought the sentence of the justices directly under review of the Court of Session by advocacy. The court held that he behoved first of all to take his appeal to the quarter sessions. It is, I submit, a sufficient answer both to the plea of the presbytery and to their authorities, to observe, that these were questions of purely *civil jurisdiction*. There was no competing jurisdiction as in the present case, where the whole attempt is to exclude the civil action on the ground of want of jurisdiction, and that, too, *on the supposition, if not admission, that there was an excess of power on the part of the church court*. The plea, in short, just raises the question of competency in another form. I have already had occasion to refer your Lordships, on another branch of the argument, to that class of decisions, where, though the review of the court is by statute expressly excluded, you can, and do interfere, when presbyteries act irregularly, or exceed their powers.

With regard to the supposed necessity for following out an appeal to the General Assembly because of the concluding sentence of the act 1567, c. 7, and the personal exception taken against the pursuers for not having so appealed. I have only to say that in the cases of *Auchtermuchty*, *Culross*, *Dunse*, and *Lanark*, the exception was taken, and in the first of these cases very strongly urged. The civil action was there instituted immediately after the sentence of the *presbytery*, though a protest and appeal had been taken to the synod, but not followed forth. In the case of *Culross*, the civil action was instituted *after* the sentence of the presbytery had been affirmed by the synod. In the case of *Dunse*, it was instituted pending an appeal to the *synod*; and in the case of *Lanark*, after Dr. Dick had actually been ordained and admit-

ted. It is impossible, therefore, in the face of these authorities, to contend with effect, that the pursuers are barred, by not having followed the course of appeal through all the church courts, from making the sentence of the presbytery rejecting Mr. Young the subject of adjudication in the civil court.

What the act 1567, c. 7, was held to have conferred on the church, was the right of examination and trial of the *qualifications* of ministers. And so long as the church did not act arbitrarily, but kept within the proper limits of that duty, and applied only the known legal tests, her sentences are admitted to be final, as the sentences of presbyteries are under the schoolmasters' act. But if the presbytery *refuse* to try the qualifications of a minister or schoolmaster, or reject him upon grounds foreign to the known and ordinary personal tests of qualifications, and act arbitrarily, or delegate their duty to third parties, it is vain to say that their sentences are conclusive, or that the civil court cannot give redress. Such a doctrine would be in effect to give to the church courts the power of rejecting all candidates for the ministry who seek ordination and to be inducted into a benefice by virtue of a deed of presentation.

I have now only to apologize to your Lordships, for having occupied so much of your time, with what I am afraid is a very imperfect statement of this important case.

Tuesday, 28th November 1837.

MR. ROBERT BELL,—My Lords, I have the honour to attend the court on the part of the presbytery of Auchterarder, who are cited as defenders in this case, along with certain other parties for whom I do not appear. The case itself is one of much importance, involving, as it does in our view of it, the risk of a collision between two equally supreme and independent jurisdictions; a risk which your Lordships must always be anxious to avoid. The case is brought into court, by a summons of a very unusual and extraordinary nature. It commences with an abstract and simple declarator, without petitory conclusions of any kind, against *one party*, in order to found petitory conclusions against *two other parties*, in circumstances where the decision first sought for can afford no *res judicata* against the other parties to the action. Such is the general nature of the summons; but it will be more convenient to delay the particular examination of it till after the nature of the case has been explained.

The first observation which I have to make is, that the pursuers not only agreed in the Outer-House, but they insisted on taking the question with the presbytery first. They also agreed to let us argue the case as upon the supposition, that the trustees of the Widows' Fund would after all prevail in carrying off the fund from both the pursuers; and it is on this footing, which, after all, I would have been entitled to at any rate, that I intend to argue the case.

I would remark in the next place, with much deference, that both here and in the Outer-House, the points which are argued by my learned friends with most triumphant success, are just those which are either not maintained, or at least not denied, on our part. I will therefore state explicitly, before I proceed any further, what the points are which we admit, or which we do not maintain.

1st, Then, I do not maintain that the Church Courts have any right to interfere with civil jurisdiction, or rather with civil questions, in any shape; and accordingly, the presbytery *sustained* the presentation in this case.

2d, I admit, that if presbyteries violate any civil rights, there may be civil consequences arising out of such usurpation; but I say that they are not those which are concluded for in the present summons.

3d, The question is not raised in this case, whether induction *per se*, and independent of the patron's nomination, can in any case confer any civil rights upon the person inducted. But I do maintain, on the other hand, that it has never been held under the presbyterian constitution of the Church of Scotland, that the

patron's presentation *per se*, confers any right to the fruits of the benefice, unless when it is followed by induction.

4th, It is not necessary to my case to defend the late act of the General Assembly, although I will probably say something on that subject before I conclude. At present I only say, that that act, whether it is a good or a bad one, is beyond all question the existing law of the Church, which all its judicatories are necessarily bound to obey.

5th, While I would betray my duty to my clients, and belie my own opinion, if I admitted of any jurisdiction in this court, to alter or control any proceedings of the church courts, or church judicatories, in matters of a spiritual or ecclesiastical nature, I am not here to dispute the rule, which is applicable to all courts of law, that your Lordships may consider questions of all kinds when it is necessary to enable you to expiscate your own jurisdiction. Nor particularly am I to dispute, or rather I expressly admit, the clear right of your Lordships to consider and determine whether any question which may come before you is of an ecclesiastical or a civil nature.

6th, Least of all am I here to deny, that in all civil matters, your Lordships may decide, as it is called in one of the decisions, "*ad hunc effectum*," i. e. to the effect of determining what the civil consequences of any ecclesiastical judgment ought to be. But I do most particularly maintain, that the Church exercised no temporal jurisdiction in this matter. They claimed no "*jus devolutum*," and there is no conclusion in the summons, notwithstanding of its having been anxiously amended after the omission was pointed out, touching that matter in any respect. They have claimed no stipend hitherto, either for themselves, or for any other person, and they expressly and distinctly admit, that in no circumstances can they as a presbytery ever be entitled to make any such claim in any shape.

The questions, therefore, at issue between us and our learned friends, although they have been argued at much length, are extremely narrow in themselves: And, without meaning to treat them all separately, I shall read, from a note which I have made of them, what I conceive them to be. They are, 1st, Whether the church courts are subject to the review, or control, of this, or any other civil court, "*in rebus ecclesiasticis*." 2d, Whether the church courts have usurped any civil jurisdiction in this matter. 3d, Whether they have violated any compact, whether real or supposed, between the church and the state; and have thereby acted *ultra vires* of the power properly belonging to them. 4th, Whether your Lordships have here a case in which you can interfere with the proceedings of the church courts in any respect; and whether

the summons, as it has been amended, raises any question on which you can decide, *as against the presbytery*. 5th, Whether, in the circumstances of this case, the pursuers are not barred from insisting in their action, in consequence of their own conduct in the church courts. These questions embrace all the points brought to issue by the summons, and I shall take the two last mentioned out of the usual order, because the case is very peculiar, and they will be better understood after the merits have been fully explained.

It is now necessary to call the attention of the court particularly to the proceedings of the presbytery in this case. In consequence of the death of the late minister of Auchterarder, a presentation by the Earl of Kinnoul, as patron, in favour of Mr. Young, the other pursuer, accompanied by all the necessary documents, was produced to the presbytery, on the 14th October 1834; and according to the invariable practice of the Church, they were appointed to lie upon the table till the next meeting of the presbytery.

On the 27th of October the subject was resumed, and “the presbytery considering that all the documents usually given in in cases of this kind, have already been laid on the table, along with the presentation by the Earl of Kinnoull to Mr. Robert Young, preacher of the gospel, to be minister of the church and parish of Auchterarder, did, in pursuance of the first regulation of the Act of Assembly, *anent calls*, in so far sustain the presentation, as to find themselves prepared to appoint a day for moderating in a call to Mr. Young.” They then made the usual and necessary orders, after which the minutes bear, “In all which sentence of the presbytery, Mr. Moncrieff,” (who appeared for the patron, although I think my learned friend, Mr. Whigham stated by mistake that the patron was not present) “acquiesced, and took instruments in the clerk’s hands.”

At the next meeting on 2d December, the presbytery “proceeded, in terms of the third regulation of the interim act of the last Assembly *anent calls*, to give an opportunity to the male heads of families, being members of the congregation, and in full communion with the church, whose names stand in the roll which has been inspected by the presbytery, to give in special objections or dissents, when no objections were given in.” Mr. Young then appeared by his agent, although the contrary was said, no doubt inadvertently, by my learned friend. The minutes distinctly bear, that “a mandate from Mr. Robert Young, presentee to the parish of Auchterarder, to Archibald Reid, Esq. writer in Perth, was given in, authorizing him to appear as his agent in this case; which mandate having been read was sustained.” It is then stated—“Compared William

“Thomson, session clerk of Auchterarder, and being asked, produced a roll of male heads of families in the parish of Auchterarder, in terms of the regulations of the act of last Assembly anent calls. At this stage, Mr. Reid, the agent of the presentee, was heard, and objected to the presbytery either receiving or acting upon said roll.” But why did he object? Not because it was contrary to law to *use a roll*, but on the totally opposite and inconsistent ground, “inasmuch as the same was not made up, either within the time, or in the manner prescribed by act of Assembly.” Your Lordships therefore find the presentee not only distinctly homologating the act of Assembly, but making it his only ground of complaint that it had not been rigidly adhered to; and on this ground he took an appeal to the synod.

There was also a question raised, touching the presentee's right to extracts, or copies of certain parts of the proceedings, which were furnished, but not as matter of legal right. On this head also, Mr. Reid for the presentee, appealed to the next meeting of the synod; and then the minutes bear, “In conformity with the regulations of the act of Assembly, the presbytery then proceeded to afford an opportunity to the male heads of families, whose names stand upon the roll, to give in dissents from the call and settlement of Mr. Robert Young as minister of the parish.” Certain heads of families then entered their dissents against the presentee, and “the presbytery found, in terms of the 9th regulation, that dissents have been lodged by an apparent majority of the persons on the roll inspected by the presbytery, and then, in terms of the 9th regulation, they adjourned the proceedings in this case, to their next meeting, to be held at Auchterarder on Tuesday the 16th current.”

The minutes of the 16th December 1834, bear, “which day the presbytery proceeded, in terms of the 12th regulation of the Act of Assembly anent calls, to ascertain whether or not the major part of the persons on the roll, of male heads of families, in the parish of Auchterarder, inspected by the presbytery, entitled to dissent, who dissented against the settlement of Mr. Young, do still adhere to their dissents; when on the question being asked by their moderator, none appeared to withdraw their dissents. The presbytery at the same time found, in terms of said regulation, that there is a majority of the persons on the roll still dissenting.

“The presbytery then proceeded, in terms of the 13th regulation, to give an opportunity to the patron, presentee, or any member of presbytery, to require all, or any of the persons dissenting, to appear before the presbytery at a meeting to be held in terms of said regulation, to declare, in terms of the re-

“ solution of the General Assembly ; when, on the question being asked by their moderator, no such requirement was made. The presbytery therefore adhere to the above finding, that a majority of the persons on the roll still dissent.”

The appeals which had been taken by the presentee to the synod, were discussed in that court, and it is of importance to observe distinctly what they were.

1st. “ Against a judgment of the presbytery of Auchterarder, pronounced on said day, repelling the objections of the agent for the presentee, to the presbytery either receiving or acting upon a roll of male heads of families in the parish of Auchterarder, produced that day ; inasmuch as the same was not made up within the time, or in the manner prescribed by act of Assembly.”

2d. “ Against a judgment of the said presbytery pronounced on the same day, resolving to proceed in the settlement of Mr. Young, under the regulations of the Assembly 1834, notwithstanding of the previous appeal.”

3d. “ Against a judgment of the said presbytery pronounced on the same day, finding that dissents had been lodged by an apparent majority of the persons standing on the roll, and therefore adjourned the proceedings to a future day.”

I thought till I began that what I have now read were *the reasons* of appeal, which therefore I have not with me, but these titles sufficiently describe what they were ; and my learned friend who opened the case, and who was a member of Assembly, will admit to me, that in that court the whole case was argued and decided without one syllable having been stated hostile to the law of 1834 ; and that on the contrary, (independent of the matter of the extracts), the only question raised was on the ground that the act of Assembly had not been implicitly obeyed, in which, however, it was determined that the presentee was in the wrong.

The synod affirmed the sentence of the presbytery, and the case was carried to the General Assembly, where, besides the question upon the merits, there was considerable discussion on the point of form about the delivery of extracts ; and the result was, “ it was moved and seconded that the General Assembly sustain the appeal, reverse the sentence of the presbytery of Auchterarder, in so far as the presbytery refused to proceed with the trials and settlement of the appellant, as presentee of the parish of Auchterarder, there being no special objection against him, or dissents by a majority of the male heads of families, according to a roll made up in the manner prescribed by the regulations enacted by the General Assembly ; and remit to the presbytery of Auchterarder to proceed with the trials and settlement of the appellant, according to the rules of

“ the church. Another motion was made and seconded, that the
 “ General Assembly find that the synod were wrong in finding
 “ that the appellant had not a right to any of the extracts referred
 “ to, and so far sustain the appeal, and reverse the sentence in
 “ that matter. But in respect that the presbytery, while they
 “ referred the questions as to the right of the appellant to require
 “ such extracts, did authorize the clerk to give the extract, which
 “ was afterwards produced to the synod, and that the said extract
 “ was upon the table of the synod, and was read, as the minutes
 “ bear, and that a copy of that extract has been laid before the
 “ Assembly by the appellant : find that the said sentence forms
 “ no bar to the Assembly now giving judgment on the merits of
 “ the cause ; and on the merits dismiss the appeal : and find that
 “ the proceedings of the presbytery are not liable to any valid ob-
 “ jections, and remit to the presbytery to proceed farther in the
 “ matter, in terms of the interim act of last Assembly. The
 “ vote having been called for, it was agreed that the state of the
 “ vote should be first or second motion, and the roll being called,
 “ and votes marked, it carried second motion by 131 to 95.”

Acting in obedience to this sentence of the General Assembly, the presbytery, 7th July 1835, “ rejected Mr. Young, the presentee to Auchterarder, so far as regards the particular presentation on their table, and the occasion of this vacancy in the parish of Auchterarder, and do forthwith direct their clerk to give notice of this their determination to the patron, the presentee, and the elders of the parish of Auchterarder.”

Against this sentence no appeal was taken to the superior church courts, as litigants before them are required to do by Act of Parliament ; and the patron and his presentee proceeded at once to raise the summons in the present action, to the terms of which, as amended after full consideration, and after defences for my clients, as well as for the other defenders, had been lodged, I have now to request your Lordships' attention. It libels Lord Kinnoull to be the patron, and narrates certain Acts of Parliament, and the proceedings of the church courts, but in both cases very imperfectly. It then goes on to aver, “ That the foresaid judgments or deliverances of the said presbytery, of date 2d December 1834 and 7th July 1835, were *ultra vires*, illegal and unwarrantable, in so far as that though, by the laws and statutes before libelled, the presbytery were bound and astricted to make trial of the qualifications of the pursuer, Robert Young, as presentee to the church and parish of Auchterarder, and were not entitled to delegate to or devolve that duty on third parties, or to denude and abandon their right and duty as a church court, to judge of and decide upon the qualifications

“ and fitness of the presentee for the pastoral office and charge ;
 “ and after examination by said presbytery, if the pursuer, the
 “ said Robert Young, as presentee foresaid, was found to be
 “ duly qualified, the said presbytery were bound and astricted,
 “ as aforesaid, to have admitted and inducted him into the office
 “ of minister of the church and parish of Auchterarder. Never-
 “ theless, though the pursuer, the said Robert Young, is duly
 “ qualified as a licentiate of the Church of Scotland, and presentee
 “ foresaid, as well as in all other respects, to be received and ad-
 “ mitted minister of the church and parish of Auchterarder, and
 “ though no objections have been stated against his qualifications,
 “ the presbytery not only refused and continue to refuse to take
 “ the pursuer upon trials, and to pronounce judgment on his
 “ qualifications as presentee, or to admit and receive him as mi-
 “ nister of the church and parish of Auchterarder, but have by
 “ their sentence rejected him as presentee to the said church and
 “ parish, without trial, without taking cognizance of his qualifica-
 “ tions, and expressly on the ground that they cannot, and ought
 “ not to do so, in respect of a veto of the parishioners : in all
 “ which respects the said presbytery, and the individual members
 “ thereof, have exceeded the powers conferred on them by law,
 “ and acted illegally, in violation of their duty, and of the laws
 “ and statutes libelled ; and that to the serious prejudice of the
 “ patrimonial rights of the pursuers : And although the pursuers,
 “ as patron and presentee foresaid, have often desired and requir-
 “ ed the said presbytery to discharge their duty in terms of law,
 “ and the statutes libelled, by proceeding with the trials, admis-
 “ sion, and final settlement of the pursuer, the said Robert
 “ Young, as minister of the church and parish of Auchterarder ;
 “ yet they illegally, contumaciously, and in violation of their
 “ duty, and to the serious injury and prejudice of the patrimo-
 “ nial rights of the pursuers, refused and continue to refuse so to
 “ do.”

The summons then concludes, not that the presbytery are bound
 to admit the presentee, nor that he shall be inducted without their
 sentence, but “ that the rejection of the pursuer by the said pres-
 “ bytery as presentee foresaid, without making trial of his quali-
 “ fications in competent and legal form, and without any objec-
 “ tions having been stated to his qualifications, or against his ad-
 “ mission as minister of the church and parish of Auchterarder,
 “ and expressly on the ground that the said presbytery cannot
 “ and ought not to do so, in respect of a veto of the parishioners,
 “ was illegal and injurious to the patrimonial rights of the pur-
 “ suer, and contrary to the provisions of the statutes and law
 “ libelled : And it being so found, or in the event of the said
 “ presbytery still continuing to refuse to discharge their duty, by

“proceeding in the trials of the pursuer as presentee, and in his induction as minister of the church and parish of Auchterarder, the said Robert Young, pursuer, ought and should be found and declared to have the just and legal right to the constant localled and modified stipend, with the manse and glebe, and whole other emoluments pertaining and belonging to the church and parish of Auchterarder, and that for crop and year 1835, and in time coming during all the days and years of his life.”

Now this conclusion cannot be maintained in any case *against the presbytery*. They pretend no right either to the stipend, manse, or glebe in any possible case. And therefore along with this useless conclusion against them, the summons concludes that “Dr. Andrew Grant, one the ministers of Edinburgh, collector, nominated and appointed under the several statutes, passed for the better raising and securing a fund for a provision for the widows and children of ministers of the Church of Scotland, and all others, ought and should also be decerned and ordained by decree foresaid, to desist and cease from molesting and disturbing the pursuer, the said Robert Young, in the possession and enjoyment in time coming, during his life, of the said localled and modified stipend, manse and glebe, and whole other emoluments belonging and pertaining to the said church and parish of Auchterarder;” and then it goes on to conclude, that “the heritors ought and should be decerned and ordained by decree foresaid, to make payment to the pursuer, the said Robert Young, of the stipend payable by each of them respectively, according to their several proportions, in terms of the subsisting decrees of locality, and that for crop 1835, and at the usual terms of payment, in time coming, during the life of the pursuer the said Robert Young: And farther, to perform and fulfil all the other obligations incumbent upon them as heritors, to the pursuer the said Robert Young, as legally, validly, and effectually, presented as aforesaid to the said church and parish of Auchterarder.”

There are then alternative conclusions in favour of the patron. They conclude for payment of the stipend to him, instead of the presentee. As in the former case, they all result into a claim for the emoluments, and there are many averments against the presbytery in both sets of conclusions. But there is no demand for an order upon it to do any one thing. There is no petitory conclusion of any kind against the presbytery, which is an independent, and in its proper sphere, a co-ordinate court with your Lordships.

And here, I ask your Lordships, whether we are to be told that this course was adopted from delicacy towards us? Has any party a right to bring out half a case when he enters a court of justice,

and to say that he gives his antagonist the credit of believing that when he hears the opinion of the court, he will, *of his own accord*, retrace his steps, and do what the court may think would be right; when at the same time he gives the court *no power* of discerning in such terms as would compel the party said to be in the wrong to respect the opinion which may be delivered, or to obey the sentence which may be pronounced. I say no more on this subject at present; I only ask whether this is a predicament in which a supreme court should be placed in any circumstances, or on any pretence of delicacy or consideration towards an antagonist. But it is mere affectation to speak of delicacy in this way; and I rather think it proceeds from the conviction that there was no form under which petitory conclusions could be framed, so as to affect the presbytery, and not from any feelings of the kind now pretended, that this most extraordinary course was adopted; and certainly my clients do not feel themselves bound to accept of any such delicacy at the hands of the pursuers.

Mr. Whigham said we had violated a compact of some sort or other, and he asked your Lordships to declare this; but he never attempted to show what you can do if the presbytery should be obstinately contumacious. I am not bound to conjecture what my friends may be keeping in reserve; but in one word I ask your Lordships, could the court charge us—an ecclesiastical court—to find the presentee qualified for the office, and consequently to induct him into it? Or failing of our doing so, could you do it yourselves? I must pray your Lordships' attention to this, for it is really of importance. I am not asking at present whether the summons is properly libelled. But conflicts of jurisdiction are always unpleasant; and do the pursuers wish this supreme court to pronounce a judgment *which it cannot enforce*? Do they wish to create a collision between the civil and ecclesiastical judicatures,—and the General Assembly is something more than a judicature,—which without the uncertain aid of Parliament may never be cleared up? Do they wish to place you in a position where the judgments of the highest civil court in the kingdom, may,—call it contumacity, call it obstinacy, call it what you will,—I say where your judgment, whatever it is, may be spurned and contemned. For whatever may be your decerniture, I am sure you cannot enforce it, excepting in so far as it may relate to any purely civil matter. Would it be dignified,—would it be suited to the high functions of your Lordships—to pronounce a judgment first, and then to have to wait for a new act of Parliament to enable you to enforce it?—an act too which may never be obtained, and the nature of which must be altogether uncertain in the midst of the storms which have been recently and are still raging around the Church? Yet my friends do not even attempt

to tell us, how your Lordships can enforce the decree, which they say may *afterwards* be demanded of you; and not only so, but they do not even tell us what the proposed decree is to be. Surely your Lordships will never pronounce any judgment founded on demands such as these.

I may have to return to this subject afterwards. I now pray your Lordships to observe in the next place, that all ecclesiastical proceedings, and especially those which are necessary for conferring the clerical character, have always been in the power of the Church of Scotland, *as by law established*, which is the sense in which I desire to be understood in speaking of the church on the present occasion. The general principle of this is evident even from the act 1592, c. 116, so much relied on by my learned friend, which bears, “Item, the kingis majesty and estatiss foresaidis, declaris that the 129 acte of the Parliament, halden at Edinburgh the 22 day of Maii the zeir of God ane thousand five hundredth fourscoir four zeirs, sall naways be prejudicial nor derogate ony thing to the *privilege* that God hes given to the spiritual office-bearers in the kirk concerning heads of religion, matters of heresie, excommunication, *collation or deprivation of ministers*.” “And therefore ordains all presentations to benefices to be direct to the particular presbyteries in all time cumming; with full power to give collation thereupon, and to put ordour to all matters and causes ecclesiastical within their boundes, according to the discipline of the kirk: providing the foresaid presbyteries be bound and astricted to receive and admit quhatsumever qualified minister presented be his majesty or laick patrones.”

The power of collation thus vested in the church—and it will be observed that the word used in both places is *collation*, not ordination—was confirmed to them by 1690, c. 5, which bears, “Therefore their majesties, with the advice and consent of the said three estates, do hereby revive, ratifie, and perpetually confirm all laws, statutes, and acts of Parliament made against popery and papists, and for the maintenance and preservation of the true reformed Protestant religion, and for the true church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likeas they, by these presents, ratifie and establish the Confession of Faith, now read in their presence, and voted and approven of by them, as the publick and avowed confession of this church, containing the sum and substance of the doctrine of the reformed churches, (which Confession of Faith is subjoined to this present act.) As also they do establish, ratifie, and confirm the Presbyterian church government and discipline,

“ that is to say, the government of the church by kirk-sessions,
 “ presbyteries, provincial synods, and General Assemblies, rati-
 “ fied and established by the 114 (116) act of James VI. Par-
 “ liament 12, anno 1592, entituled *Ratification of the Liberty*
 “ *of the True Kirk, &c.*, and thereafter received by the gene-
 “ ral consent of this nation to be *the only government* of Christ’s
 “ church within this kingdom, reviving, renewing, and confirming
 “ the foresaid act of Parliament *in the whole heads thereof*, ex-
 “ cepting that part of it relating to patronages which is hereafter
 “ to be taken into consideration.”

But the authority of the church may be traced up to the very commencement of its establishment. It is proved by every provision which has ever been made for the admission of ministers, that from the beginning the ordination, and collation or admission, of ministers has always been in the church.

The earliest authority to which I would refer is the act of Parliament 1567, c. 7, by which the steps which had been originally taken for establishing the reformed religion in 1560, but which were not then agreed to by the Crown, were confirmed and legalized. Before reciting the act, however, I must advert to the assertion of Mr. Whigham, that it was repealed, or at least that it was tacitly altered by the act of 1592. Now, this is altogether a mistake, the fact being that the act 1592 *expressly confirmed* the act of 1567 in all its parts. This appears from the act 1581, c. 99, having ratified and approved the act “ anent the ad-
 “ mission of them that shall be presented to benefices having cure
 “ of ministry,” which is the title given to 1567, c. 7, in the records, though it has been omitted in the printed copies. And the charter of the church, as it is rightly termed, or the act 1592, c. 116, confirms not only that act of 1581, but all other acts in favour of the church, which it ratified and confirmed. “ Our souveraine Lord
 “ and estates of this present Parliament, following the lovabil and
 “ gude example of their predecessours, hes ratified and appreeved,
 “ and be the tenour of this present act ratifies and appreis all
 “ liberties, priviledges, immunities, and freedom quhatsumever,
 “ given and granted be his Hienesse, his regentes in his name, or
 “ onie of his predecessours, to the trew and halie kirk presently
 “ established within this realme, and declared in the first act of his
 “ Hienesse Parliament the twentie day of October, the zeir of
 “ God, ane thousand five hundredth three scoir nineteen zeires
 “ and *all and whatsumever acts* of Parlt. and statutes maid of
 “ before be his Hienesse, and his Regentes, anent the liberties
 “ and freedom of the said Kirk, *specially the first act* of the
 “ Parlt., halden at Edinburgh, the twentie-four daie of October,
 “ the zeir of God *ane thousand five hundredth fourscoir ane*
 “ *zeires*, with the haill particular acts there mentioned, quhilk

"shall be as sufficient as if the same were here expressed; and all other acts of Parliament made since in favour of the free kirk."

I pray your Lordships' particular attention to the ratification I have now read, for it goes deep into the question of the supposed compact between the church and the state, of which so much has been said on the other side. At present it is quite plain that the act 1592, did not repeal or alter the act 1567. And if it had done so, which is impossible after this express confirmation of it, it could only have done it tacitly; which your Lordships know is never presumed; for in the words of Lord Stair, *posteriora derogant prioribus*, only "where they expressly contradict the same, or are inconsistent therewith." And it is impossible to maintain that there was any direct contradiction, or the smallest inconsistency between the two acts of Parliament.

But in the next place, even if the act 1592 had repealed that of 1567, it was itself repealed *quoad hoc*. It was first annulled altogether by 1612, establishing episcopacy. It was renewed for a time by the act of convention 1638, and was again repealed, at the restoration, by the general rescissory act when episcopacy was restored. And finally when presbytery was re-established, the act 1690, c. 5, renewed and re-enacted the charter of 1592. It was not, however, re-enacted *simpliciter*, but under the express exception of all that it contained on the subject of patronage, the words being "reviving, renewing, and confirming the foresaid act of Parliament in the whole heads thereof, except that part of it relating to patronages, which is hereafter to be taken into consideration."

Afterwards, by another act of the same year 1690, c. 23, provision was made as to the matter of patronage, which for the time altered the law altogether; but till c. 23 was passed, under chapter 5, the act 1592 stood repealed, and the original act of 1567 was, for the time, the standing law of the church.

And now it will be particularly observed, that the act of 1690, c. 23, which, as I have mentioned, placed patronage on a different footing, was itself repealed, in so far as related to patronage, by 1711, c. 12, commonly called Queen Anne's Act, which declares in section 5. "Declaring always, That nothing in this present act contained, shall extend or be construed to extend, to repeal and make void the aforesaid twenty-third act of the second session of the first parliament of the late King William and Queen Mary, *excepting in so far as relates to the calling and presenting of ministers*, and to the disposing of vacant stipends in prejudice of patrons only." But the 5th act of 1690, was not then, *and never has been repealed*; and therefore, under it, the statute 1592 still stands repealed as to patronage; and the whole law as to that matter is left as it was before, upon the act 1567

unless it can be shown that there is some other act which has again placed it on a different footing.

Now the only other act which has been, or which can be referred to, is that of Queen Anne just mentioned, and all that it says, is, "Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the aforesaid act made in the year one thousand six hundred and ninety, intituled, *Act concerning patronages*, in so far as the same relates to the presentation of ministers by heritors and others therein mentioned, be, and is hereby repealed and made void."

The way in which the presbytery were bound to have received and admitted ministers, "before the making of the act 1711," (1690, c. 23, having been entirely repealed as to patronage,) was the way in which the law stood under 1690, c. 5, which left 1592 repealed as to that point. And that was just the way in which it was placed by 1567, c. 7, of which I have been speaking.

But this is a point which has been maintained by my learned friends in their argument. And I admit that they are right in the argument, that the case of patronage was left just as it stood before the act 1690, c. 23: And, although they do not admit to me, I submit it to your Lordships as altogether unquestionable, that the act 1592 must now be read without the astringing clause.

On both of these grounds therefore, viz.—1st, That the act 1592, does not in any respect alter the act 1567; and 2d, That 1592 was itself expressly repealed *as to this matter*, I apprehend the act 1567 may now be read as the regulating law of the Church with regard to the induction of ministers. It is expressed in these terms: "It is statute and ordained by our Sovereine Lord, with advice of his dearest Regent, and three Estates of this present Parlt., that the examination and admission of ministers within this realm, be only in the power of the Kirk now openlie and publickly professed within the samin. The presentation of laick patronages alwaies reserved to the just and ancient patrones; —And that the patron present ane qualified persoun within six monethes (after it may cum to his knowledge of the decease of him quha bruikd the benefice of before,) to the superintendent of thay partis quhar the benefice lyes, or uthers havand commission of the Kirk to that effect; uthewise the Kirk to have power to dispone the samin to ane qualified persoun for that time.

"Providing, that in caice the patron present ane person qualified to his understanding, and failzieng of ane, ane uthir within the said six moneths; and the said superintendent or commissioner of the Kirk refuses to receive and admit the person presented be the patron as said is:"—There is no mention here of

grounds of refusal, or of its being a reviewable judgment,—“ It sall
 “ be lesum to the patron to appeale to the superintendent and min-
 “ isters of that province quhair the benefice lyes, and desire the
 “ person presented to be admitted, quhilk gif they refuse, to ap-
 “ peale to the General Assemblie of the haille realme, *be quhome the*
 “ *cause bean decyded, sall take end as they decerne and declair.*”

The act which I have now read is expressed with much clearness and precision. Without pointing out in detail the mode in which the matter was to be conducted, which it left to the Church to arrange, it ordains that the examination and admission of ministers be only in the power of the Kirk, and that the matter being decided by the General Assembly, “ shall take end as they decerne and declair;” and for my own part I do not see how it is possible to add any thing to an enactment, the words of which are so explicit. I presume, indeed, your Lordships can require nothing more to be said on this branch of the case. But a most undue use was made of a most eminent name, and such as was well calculated to make a very undue impression in respect to points of law, in a question with which, in a general view, he was intimately acquainted. Sir Henry Moncreiff, in his life of Dr. Erskine, found it necessary to explain various matters relative to the constitution of the Church of Scotland, for the benefit of those who were not acquainted with it. In doing this he stated the views of the two parties into which the Church was divided;—he did this, with the fairness and impartiality of a judge summing up evidence to a jury; and almost never gave any opinion of his own. Yet advantage has been taken of this to represent him as if he had entertained the views of one of the parties which he describes, although every act, and, I may say, the whole course of his life, was opposed to those views.

But on the point now spoken of he did entertain an opinion; and considering the large use which has been made of other passages where he did not state his own opinion at all, I must be permitted to quote what he says from the Life of Dr. Erskine, p. 425. “ When those two acts of Parliament are taken together, “ to a person who had no system to maintain, they would naturally “ seem to have laid down this general doctrine,—that when the “ inferior ecclesiastical courts refuse the induction of a presentee “ on other grounds than his qualifications, the patron may retain “ the fruits of the benefice; but that, having a right of appeal, “ when he has brought the question by appeal from the inferior “ courts to the court of last resort, *the General Assembly*, the “ controversy between the patron and the inferior courts, *must be* “ *terminated by the decision of the Assembly*, which the act 1567 “ declares to be authoritative and final, and that there must also “ terminate the patron’s right to retain the fruits of the benefice.

“ This general idea receives considerable countenance from a fact, which can scarcely be questioned,—that neither at the time of the act 1592, nor at any period before the restoration, will it be easy to find examples, by which a patron ever attempted to retain the fruits of a benefice, after the General Assembly had decided against the induction of his presentee; though there are certainly examples in which the *majus bonum ecclesiæ*, quite independent of the moral and literary qualifications of individual presentees, has determined the Assembly to refuse their induction; or in which the Assembly has set aside presentees as disqualified for the particular charges to which they had been presented, on grounds quite independent both of their knowledge and their morals.”

Now, my Lords, if the law be as I have explained it, it might signify very little whether the act of Assembly 1834 was in the matter of the Call or not, for at least it very clearly relates to the process of the *ordination and admission* of ministers; and there is no question whatever, that ordination, or rather collation, which includes both ordination and admission, is one of those purely ecclesiastical steps, all of which I have shewn to be in the power of the Church, in virtue of all the authorities to which I have referred. I will not, however, neglect either the point about the calls, or that about the supposed compact, to which I have already adverted.

In the next place, however, it may be proper to notice the distinction attempted to be made by Mr. Whigham between ordination and collation, which last he assimilated, and perhaps rightly, to admission. His attempt at this is of considerable value in my argument, for it contained an admission that the Church is supreme as to *ordination*, and I take his admission, as it saves any farther argument regarding that matter. I only pray your Lordships to keep it steadily in view. I do not contend for critical niceties; but, if collation and admission are the same thing, then the act 1567 gives admission,—that of 1592 expressly confers collation,—and ordination is expressly admitted to me; and if there is any other distinction in law between admission and collation, and ordination, it is one which will not serve my learned friends, for ordination precedes admission, and it is quite fruitless to speak of admitting or collating without ordination, or of *forcing induction* by any power that cannot first *ordain*.

Now your Lordships will recollect that I am not denying your power to consider and to judge of the proceedings of the church courts, “ *ad hunc effectum*” of determining who shall have right to the stipend. I only say at present that you can neither com-

pel induction by the church courts on the one hand, nor prevent it on the other. You have heard the terms of the act 1567, which was ratified simpliciter in all its parts by the act 1581, and that again by the act 1592; and now you will be pleased to recollect that the act of 1592 itself declares, that the act 1584 “shall naeways be prejudicial nor derogate any thing to the privilege that God has given to the spiritual office-bearers in the kirk concerning heads of religion, matters of heresie, excommunication, collation, or deprivation of ministers;” “and, That presbyteries shall have full power to give collation upon all presentations.”

This passage does not, in so many words, repeat the declaration, that the decisions in the church courts in these matters should be final. But your Lordships have already heard, that this was expressly provided by 1567. And therefore, it is vain for my learned friends to attempt to get out of it, by what they say as to the Second Book of Discipline. I shall have occasion to consider that book more fully hereafter. I allude at present to the attempt which was made last week to show, that all the passages which it contains, and which were not specially enacted in 1592, c. 116, were rejected by the State, and which was pushed to a length which would almost have swept away the Book altogether. Mr. Whigham, if I understood him rightly, remarked that no more of it is ingrossed in the act 1592, than the regulations as to the powers of the Assemblies, Presbyteries, and Synods, from which he wished it to be inferred, that presbyteries have no powers, but what are conferred by direct grant in this or other acts of parliament. And he infers, therefore, that the act in question, contains nothing more than mere matter of regulation; and particularly that every thing in the Book of Discipline, which is not enacted *in ipsissimis verbis* in the statute, was meant to be withheld. To this, I might answer, that the special mention of presbyteries in the act, was, because it was the first act which was passed after the establishment of distinct presbyteries, and it was expedient to invest them and the synods with the powers previously vested in superintendents, and what were called Provincial Assemblies, and that there was no intention either to withhold or to take away any power formerly enjoyed by the Church, although it was not re-enacted from the Book of Discipline. But I may add, that Spottiswoode, tells us that the king was very unwilling to consent to the act at all, which he got rid of again as soon as he could: and it is clear that he only allowed new matter to be inserted in it. Now, all the other powers of the church generally were either contained in or were the consequences of former acts, or were well understood and admitted to be in the possession of the church—and

inter alia the supremacy of the church in the matter of induction had been directly declared in the act 1567.

And now in respect to the astringing clause in the act 1592, which is said by my friends to have over-ruled every other provision with regard to the *admission of ministers*. I need scarcely have paused to observe on the words, "qualified person" therein used, were it not for Mr. Whigham's assertion, that they mean a person who had got what he calls *the stamp* of a licence from the church to preach. I know very well, that in popular debates on the subject of patronage in the General Assembly, the expression was invented, and is currently used as a *vox signata* which saves some circumlocution. I know also that it has even found its way into pamphlets and other publications. But this loose mode of expression will not do in a court of law; for your Lordships will remark that the term "qualified persons" is used in the Acts of Parliament, at a time *when no licentiates were known in the Church of Scotland*; and consequently that it was used merely in contradistinction to those who should be unable to stand their trials at all, at a time when patrons had immediately before been claiming, or at least exercising the right, of appointing parties who had never been bred to the church, nor made divinity any part of their studies. The fact is, that so late as the beginning of the 17th century, no licence was required to entitle a man to receive a presentation; and it is vain to talk in this Court of *the stamp* of a licence. I apprehend, therefore, that the act 1592, meant only persons who had previously, or who could after the date of their presentations, undergo the necessary trials; and I say that the act must either be read in conformity with that of 1567, or that it stands repealed in the manner which I have endeavoured to explain.

But in truth, the very next statute 1592, chap. 117, which seems to have been passed on the same day as chap. 116, points out the legal remedy for any wrong which may be done by the church in this matter; for it contemplates the very case of the church *wrongfully refusing* to admit a qualified person; and it bears, "provided always in case the presbytery refuses to admit any qualified minister presented to them be the patrone, it sall be lauchful to the patrone to retaine the haille frutes of the said benefice in his awin handes."

I have now to advert to the fact, that our standard authorities have interpreted the powers of the church, and the nature of the redress which patrons are entitled to have against any wrong which may be done by the church, exactly in the

manner which I have attempted to do. Thus, Forbes observes, p. 49. "If the church refused to admit a qualified minister presented by the patron, he might retain the fruits of the benefice in his hands. Not as if he could appropriate the vacant stipends to himself, since that were a kind of sacrilege, but only apply them to pious uses, wherein patrons have frequently been determined by Acts of Parliament."—Act 115. parl. 12. Act 1. parl. 21. Ja. 6th.

In like manner, Erskine, in considering the question, "What if the presbytery shall refuse to admit the presentee?" remarks, "Hence the admission of one into a church by the presbytery, in opposition to the presentee, though it may confer on the person admitted a pastoral or spiritual relation to that church, cannot hurt the civil right of the patron, who, therefore, may retain the stipend, as if the church had continued vacant." (Hale, ii. 213. Cochrane, Dict. p. 9951.) "And this doctrine was confirmed by a judgment of the House of Lords, April 1753, on an appeal in the case of Dr. Dick, then minister of Lanark, (Dict. p. 9954.) The patron's right of retention however must not be understood in the sense of the old acts, as if he had the absolute property. He can only retain as a trustee, on the footing of the present law."

I request your Lordships to bear particularly in mind the words of Forbes, "refused to admit a qualified minister presented by the patron;" and those of Erskine, "Admission by the presbytery in opposition to the presentee." Recollect also the words of the act 1592, and you have a perfect answer to the attempt which was made by my learned friend to draw a distinction between what he calls illegal vacancies, and vacancies during the dependence of the necessary proceedings. Of that point, however, I will take no farther notice; for the question as to the disposal of the vacant *stipend*, or as to the nature of such vacancy cannot be determined in any question *with my clients*.

Before quitting the subject on which I was speaking, I have next to advert to a collateral proof of the entire independence of the Presbyterian Church in the matter to which I have been adverting. Presbytery, as I mentioned, was abolished in 1606; and the act 1592, which had been, for some time previously, evaded, was repealed in 1612,—and by the first act of that year, it was declared, that presentations should thenceforth be made *to the bishops* instead of the *presbyteries*. Now that act gave a civil process to the patron and his presentee, which had been entirely unknown in Presbyterian times. The words of the act, which passed in the 22d Parliament of James VI., are as follows:—"Provyding alwise in case any archbishop or bishop should refuse

“to admit any qualified minister, (accepting the presentation granted to him, *and who hath bene once received* and admitted to the function of the ministry, being then still undeprived) presented to them be the patron, In the case of any sik refuse, —It shall be lawful to the patron to reteine the whole fruicts of the said benefice in his awn hands. And ather hee or the Paroche wanting a pastor, be reason of the not planting of the Kirk, (In case the refusal thereof come be the bishop) may complaine thereof to his archbishop, and if ather the archbishop be the refuser, or else doth not give due redresse being complained unto, In that case the Lords of his Majesty's privy counsell, upon the parties complaint of the refuse, and no sufficient reason being given for the same, sall direct letters of homing, charging the Ordinary to do his duty, in the receiving and admitting of sik a person as the said patrone hes presented.”

Now, my Lords, even this power was not given in order to compel the Church *in all cases to grant ordination*, or to remedy any wrong which might be done by their refusal to do so. It was only in the case of *ministers who had been previously ordained*, that the power was bestowed, so careful was the legislature, even in those days, not to permit the civil power to interfere with any thing that was purely ecclesiastical in its nature. The civil ruler was then supreme over the Church; but no such supremacy is admitted to exist in our Presbyterian Church, and no such powers as I have mentioned were ever renewed in presbyterian times. And the very fact of its having been necessary to pass such an act in 1612, shews that it had not been understood to be the law before then, although the act of 1592 was then recent, and fully in the memory and knowledge of those who carried through the act 1612.

In aid of his argument Mr. Whigham next spoke of a compact, as he called it, between the church and the state. He did not tell us what it was, nor how, nor when it was entered into. I almost thought he meant to say, that it was in 1592, but I declare I cannot find it either there, or at any other time. He referred to loose expressions in popular debates. He referred to historians. But there was one historian more important than all the rest, whom he probably omitted, because he would have been told, that he was partial to his side of the question. But I shall not omit him, both because from his hostility to presbytery, his testimony in my favour must be beyond all suspicion, and because he expressly tells us, that when he wrote his book, he had the originals of the documents to which he refers, before him.

I have denied that there is any evidence of any thing that can be called a direct compact between the church and the state. There

had been conferences, as might have been supposed, at various times, and, if my friends will have it, there had been an attempt at a compact in the year 1578, which is thus described by archbishop Spottiswood in his history, p. 289. “ During these contentions, in the state, Mr. Andrew Melvil held the Church busied with the matter of policy, which was put in form, and presented to the Parliament at their sitting at Stirling. The Estates having no leisure to peruse it, gave a commission to divers of their number to meet and confer with the Commissioners of the Church, and if they did agree, to insert the same among the acts of Parliament. How these affairs went, and what effect the Commission took, because of the business that afterwards was made about the same, is necessary to be known; wherefore I thought meet to set down the form of policy as it was presented, with the notes of their agreement and disagreement, *as they stand in the original, which I have by me.*”

Having thus stated the causes and grounds of his knowledge of the matter, Spottiswood next inserted in his pages the whole of the Second Book of Discipline, to which he gives the name of the Book of Policy, and although he has made more subdivisions of its sections than appear in the copies which are now usually read, *the matter* is precisely the same in them all. Now, it is material to observe, that all the different articles in the book, are marked by him upon the margin, as having been considered, in one way or other, by the persons who had the management of the conference on the part of the civil authorities, and that the different answers are there very expressly inserted. Sometimes the demand of the Church is delayed, or referred for further discussion. Sometimes it is referred to the determination of Parliament. Sometimes it is agreed to at once and simpliciter. And sometimes it is agreed to under certain qualifications, which are expressly entered in the margin of Spottiswood's work, as from the original lying before him at the time when he wrote. The reason of these distinctions between the mode in which different passages of the Book of Discipline was treated, is plain from the whole context of the publication, and from the whole course of the law. It is quite clear that there were certain matters which were well understood at the time to have been previously vested in the Church, and with which, accordingly, the civil commissioners held themselves entitled to deal, by admitting them at once; while there were others which had not been so established, and which they therefore thought required further consideration, or which could not be touched without the direct authority of Parliament.

Now, it is very remarkable, that the power of the Church of Scotland to make or enact laws for itself *in rebus ecclesiasticis*

tis, — which is one of the matters not specially enumerated in the charter of 1592,—and which therefore my learned friend, strangely enough for an experienced church lawyer, as we all know him to be, thought himself warranted in asserting to have been rejected—is expressly mentioned by Spottiswood as having been among the class of those with which the commissioners *held themselves entitled to deal*. And while neither party conceived that it required any new parliamentary enactment, it is still more remarkable, that it is agreed to *with an explanation* which shews that it had been fully and maturely considered.

Using the very words of the Book of Discipline, Spottiswood, p. 295, § 11, states the demand to have been—“They have power also to *abrogate and abolish all statutes and ordinances concerning ecclesiastical matters*, that are found noisome and unprofitable, and agree not with the time, or are abused by the people.” And the answer which was given to it is stated on the margin to have been in these very remarkable words, where the reason for admitting it is expressly assigned. “Agreed, that *as they make acts in spiritual things, so they may alter the same as the necessity of time requires.*”

I have now, my Lords, to observe, that from the very beginning of the reformation, the church has exercised the power thus distinctly admitted in 1578, of making and unmaking laws at its pleasure, in all matters whether of a spiritual or merely of an ecclesiastical nature; and that, too, in all the forms used in Acts of Parliament, whether enacting, rescinding, or declaratory, over which no civil court has ever yet ventured, or has ever been so much as asked to exercise any controlling authority whatever, till at last the mere abridgment of its acts has filled a moderately thick octavo volume. Some of your Lordships who have been members of the General Assembly, know this to be the case. You know that it is a power which has been exercised without complaint, and without objection, in every year of the existence of the church; and therefore I shall confine my notice of the subject to one particular instance, which I select, because it was framed by Principal Hill, who for many years ruled the deliberations of the General Assembly, and who is known to have belonged to that portion of the church which got the name of the moderate party, and was the most inclined to acknowledge any authority there might have been on the part of the civil power, to interfere with her deliberations. I allude to the Act of Assembly 1817, against the union of offices by which clergymen were prevented from holding professorships in universities, excepting in a few excepted cases; which was clearly in the sense of my learned friend, an encroachment on their patrimonial rights, but which was unanimously

agreed to by the church, and has never been complained of by any person whatever.

Wednesday, 29th November.

I think I established, in the course of my statement yesterday, the power of the ecclesiastical courts to decide without appeal, in all cases which can occur respecting the appointment and deposition of ministers, and to pass such laws of their own authority, as may appear to them to be necessary for the regulation and determination of those matters, provided that in doing so they do not interfere with any civil proceeding ; that is, with any matter which it belongs to the civil court to determine.

Before advertng to the matter of the call, which is an ecclesiastical step towards the examination and ordination of ministers, I beg leave to request your Lordships' attention, in the next place, to the decisions which have been pronounced in similar cases. I do so at this stage, because those decisions relate more to the general question of the respective powers of the civil and ecclesiastical courts, than to the exact regulation of the matter of the call. And from those cases I think it will appear, that your Lordships' predecessors held that they had no right to interfere with the proceedings of the ecclesiastical courts, as to the admission of ministers, and never have interfered at all, excepting when it appeared that the presbytery was endeavouring to proceed upon the *jus devolutum*, and claiming to themselves the exercise of the civil right of patronage.

The first case which I shall mention, is that of *Hay v. the Presbytery of Dunse*, 25th February 1749, which I take up before those of earlier date, because the principles laid down in it, appear to me to contain a key to all the others relied on, either by my learned friend, or on this side of the bar : and I will preface the quotation of it by observing, that according to the constitution of the Church of Scotland, there are two matters involved in the appointment and admission of ministers ; the one the right of patronage, which is entirely civil ; the other, the right of examination, ordination, and collation, which are purely ecclesiastical. Or at least if there is any distinction as to collation or admission, the last, equally with the others, has been, and is necessarily, placed by law in the ecclesiastical courts, as it cannot be performed at all, unless when it is preceded by the ecclesiastical steps. And while the Court of Session is supreme in all that relates to the *civil right* of patronage ; the other matters belong entirely to the church.

There were two questions in the case of *Dunse*. The first was with regard to the right of a patron who had not taken the oaths to government, to exercise his functions through the medium of

a commissioner who had done so. The other was about the power of the Court of Session to interfere with what the church had done in the matter of *inducting and admitting* a person different from the patron's presentee. But it did not comprehend the farther, and much more serious question, which is raised in the present case, about the right of the civil court to find, or even to express any opinion at all, touching the proceedings of the church courts *in refusing to induct, or to try* on any pretence whatsoever. No such attempt was ever made till now. And even as to the far inferior questions which were actually raised, it will be seen, that while the court held itself entitled to decide the civil question, *when there were competing claimants to the stipend, they refused to decide it in a question with the presbytery*, which is our case here. And they refused to interfere at all *in the question of induction*, as being one with which they had no right, as it is expressed in the report, "to meddle."

There are two reports of that case, which are not contradictory ; but I shall confine myself to that of Lord Monboddo, as being more precise and distinct than the other on the questions to which I have last alluded, although it is not that which was referred to by Mr. Whigham. It is in the 5th volume of Brown's Supplement, p. 768, where it is thus stated :

"A declarator was brought at the instance of Mr. Hay, as patron of the parish of Dunse, against the presbytery of Dunse, to have it found and declared, *primo*, That he was patron of the said parish ; *secundo*, That he had presented a person who was duly qualified to accept (by taking the oaths to the government) and had accepted ; *tertio*, That the presbytery had no right to present *pro hac vice tanquam jure devoluto*. *The occasion of this process, was the presbytery's*," (not, your Lordships will observe, exercising, or attempting to exercise the *jus devolutum*, but) "*appointing a moderation at large, notwithstanding of the presentation*, upon which the patron appealed to the synod, and at the same time brought this process.

LORD GILLIES,—What is a moderation at large ?

MR. BELL,—A call at large is a mode by which the people choose their own minister without any presentation, or other exercise of the right of patronage ; and when sanctioned by the presbytery moderating in it, it is effectual to constitute the spiritual relationship, and the right to exercise all the functions of a parish minister, whether the stipend and other emoluments are to belong to the person so appointed or not. The report proceeds,

"It was objected on the part of the presbytery, *primo*, That they were not proper contradictors in a question concerning the right of patronage ; and that a declarator of the right against

“ them, could have no effect against the heritors, in a question concerning the vacant stipend, or against the crown, or any other competing patron. *Secundo*, That by the 7th act, anno 1567, the admission and examination of ministers were declared to belong solely to the church; and in case of any dispute betwixt the patron and the church about the admission and collation of a minister, the matter was finally to take end before the General Assembly; and accordingly, while Presbytery was the established religion in Scotland, there is no example of any such civil process issuing against a presbytery, or other church judicature, obliging them to ordain and admit a presentee, or to shew cause for their refusal, as was used against the bishops in the time of episcopacy. *Tertio*, There was reason to believe, that in this case, Belton was trustee for Drummelzier, a patron that was not qualified to present, by having taken the oaths to the government, and it was not in the power of a patron to evade the law by making such dispositions in trust.”

“ To which it was answered, *primo*, that the only design of the declarator was to establish the patron's right against the presbytery, who were by law patrons, in case he had failed to present within the six months, and in such a process, to be sure the presbytery were proper parties. *Secundo*, that the 7th act, 1567, plainly related only to the power of examining and admitting ministers, if, upon examination, they are found qualified, which is certainly wholly in the church; and with respect to it only the appeal lies to the General Assembly, where the matter is to take end; but it cannot be supposed to give an arbitrary right to the presbytery to settle a man other than the presentee, who should have right to the stipend, otherwise the patron's right reserved by the act would signify nothing. Now, as to the church's power of examination and ordination, nothing is here concluded. The process only relates to the patron's right to present, and the presentee's right to accept, and whatever be the issue of it, it can never hinder the church to reject the presentee upon trial.”

Here the power of rejection upon trial is specified as one way in which the presentee may be disappointed; and your Lordships will particularly remark what follows, which contains the distinct admission of the patron that the presbytery were entitled to refuse to try the presentee at all; for in the argument for the patron it is said,—

“ If they please they may, without giving him any trial, settle another, but then that other will have no right to the stipend; and this process, in so far as it warns the presbytery of this, and lets them see what they are doing, ought to be reckoned a service to the church. *Tertio*, Belton, though he holds this patronage of

“Drummelzier only during his life, has declared upon oath, before the presbytery, that he was not trustee for Drummelzier, which the Lords sustained; dissent, Arniston, who declared his opinion that an unqualified patron could not elude the law by conveying his right in trust to another.

“*There were other two conclusions of the declarator which the Lords would not meddle with. The one was, that the stipend did belong to the patron till the presentee was settled. This the Lords did not think competent to be declared against the presbytery, who never could have any right to the stipend. The other was, that the presbytery ought to be discharged to moderate a call at large, or settle any other man, because that was interfering with the power of ordination, or the internal policy of the church, with which the Lords thought they had nothing to do.*”

Here, then, your Lordships have a case where the patron admitted, because he could not deny, the independent jurisdiction of the ecclesiastical courts; and particularly and expressly the right, or the power, *to refuse to try*; and where this court would not declare against the presbytery as to the stipend—distinctly because they were not the proper contradictors—and would not interfere at all to prevent the induction of a person different from the patron's presentee, because they were clear that they had no jurisdiction in ecclesiastical matters.

The next case to which I shall refer is that which was so largely quoted from on the other side, *Moncreiff v. Maxton*, 15th Feb. 1735. The report in Morrison, p. 9909, is all to which it seems to be necessary to refer your Lordships:—

In that case, the patron granted a presentation in favour of Mr. Matthew Moncreiff, *but the presbytery, instead of sustaining it, or agreeing to act upon it as a valid presentation, at a meeting “which” (as the session papers quoted by the pursuers bear,) “was still a considerable time within the six months, (and therefore before the *jus devolutum* had accrued,) so far rejected the presentation, that they appointed a moderation at large of a call to a minister for the 17th July, as if the right of presentation had been in the presbytery's hands.”* And a call having been given by the people to a Mr. Maxton, the church courts ultimately settled him. Then the question arose, not whether Mr. Moncreiff, *who had the presentation, was entitled to the stipend*, but whether Mr. Maxton settled not only without the patron's presentation, but in defiance of the presentation to another person; and when there was no pretence for maintaining that the *jus devolutum* had fallen to the presbytery, was entitled to the stipend?

The question for decision by the court was *the civil question* as to a patrimonial right. That they might be enabled to determine

that point, the court had to judge of the validity of the minister's admission. But in doing so, they did not, as your Lordships have been asked to do here, attempt to decide any thing *with regard to the ecclesiastical steps of calling, trial, or induction*. They judged solely and exclusively of *the civil question of presentation*; and the party inducted having neither a presentation from the legal patron, nor from a presbytery to whom any right had fallen *jure devoluto*, it was obvious that he could have no right to the stipend. In truth, the whole argument of the minister who had been admitted, was quite inapplicable, *the court not being called upon to determine anything as to the validity of the proceedings of the presbytery, in reference to the conferring of the pastoral office*, which, it will be particularly observed, was acknowledged on all hands to belong to him; And the right of the party settled by the call at large was one which could not be touched, and was not attempted to be touched by the civil court.

Accordingly, in the sentence, nothing like what is now asked was done. The judgment was, "that the right to a stipend is a civil right, and therefore that the court have power to cognosce and determine upon the legality of admission of ministers, *ad hunc effectum*, whether the person admitted shall have a right to the stipend or not." Now, we have never disputed this. On the contrary, we fully admit, that to the effect of deciding the conclusions as to the stipend, this court is entitled to look at the proceedings of the presbytery, and judge whether they have only exercised the powers which belong to them by law, or have acted *ultra vires*, and consequently illegally. Your determination on this matter, however, must necessarily be against the other parties, whose case has not yet been taken up, and not against the presbytery, who cannot claim, and therefore have no right to litigate about the stipend, as to which a judgment against them would afford no *res judicata*. And your Lordships' judgment as to the powers of the presbytery, can only be competent as a step towards the conclusions of patrimonial right as to the stipend; and if the conclusions as to stipend be got rid of, in the question with the other parties, this being only a step towards determining a civil right, it cannot form the subject of a substantive conclusion in itself, because the court can only judge of the proceedings of the presbytery *ad hunc effectum*, to decide the question of civil right.

In concluding the notice of this case, it is only necessary to observe, that *the presbytery were not parties to it*. There had been an interdict of the proceedings of the presbytery obtained, which was afterwards found to be incompetent, thereby adopting the view afterwards more fully brought out in the case of Dunse; and the question of stipend was tried, as it ought to be

tried here, between the patron and one or other, or all of the parties who can show or pretend an interest in it ; which is not, and which never can be the case with the presbytery.

The next case was that of *Cochrane v. Stoddart*, 26 June, 1751—Morrison, p. 9951.—“ The presbytery of Dunfermline “ having refused to receive the patron’s presentee and proceeded “ to appoint a day for the ordination of another, Charles Coch- “ rane of Culross, the patron, presented a bill of advocacy of “ the settlement which the Lords unanimously ‘ refused as in- “ competent.’ ” There was another case about the same presenta- tion, between the patron, the heritors, and a gentleman who had been inducted by the presbytery. But it was tried *without the presbytery being called as parties*, and the court did no more than the presbytery, without presuming to anticipate the defence of the trustees for the Widow’s Fund, are willing that your Lordship’s should do in the present case. It is quite plain that it was a mere question of civil right.

In the case of *Kiltarlity, Bailie v. Morison*, 28th February 1822, Shaw’s Reports, vol. i. p. 363 ; the report bears, that “ before the church forms had been completed, Bailie and “ others designing ‘ themselves elders, heritors, members of the “ ‘ kirk-session, and parishioners,’ presented a bill of suspen- “ sion and interdict against the proceedings of the presbytery, “ on the ground that the presentation was null and void on “ the statute 10 Queen Anne, c. 13. The Lord Ordinary “ having passed the bill and granted an interdict, Morison and “ Fraser reclaimed on the grounds.—1. That it was incom- “ petent by suspension and interdict, to interfere with the pro- “ ceeding of the presbytery in the settlement of a minister.— “ 2. That Baillie and others had no title to pursue ; and 3. that “ a presentation by the qualified commissioners of a Catholic pa- “ tron was valid under the statute. The court ordered intima- “ tion to be made to the Officers of State, who however did not “ appear, and their Lordship’s afterwards on advising memorials “ and a hearing in presence and on the report of Lord Kinned- “ der, as probationer, repelled the objection to the competency as “ the question regarded the civil right of patronage ; but, ‘ in “ ‘ respect that the suspenders have no title to object, alter the “ ‘ interlocutor reclaimed against and remit to the Lord Ordinary “ ‘ to refuse the bill of suspension and recall the interdict.’ ”

That case, therefore, your Lordship’s perceive, did not touch the right of trial and induction in the smallest degree. It was an attempt to get a presentation, which is entirely a civil matter, declared null and void, and the court found the question competent, solely and exclusively, because it related to a civil right.

The next case I shall notice, is that of *Lanark, Dick v. Car-*

michael, 29 July, 1752—Morrison, p. 9954, as to which it seems sufficient to observe, that there were competing presentations; that the presbytery judged of the rights of the contending patrons, which was beyond their powers, excepting in so far as it was necessary to explicate their own jurisdiction in the ecclesiastical matter; and that they preferred the wrong presentee, under a mistake in point of law. Doctor Dick, the person so inducted, did not get the stipend it is true, in consequence of the decision of this court having been reversed in the House of Lords. But *neither was it paid to the other presentee, who had not been inducted, and who, if there was wrong, was as wrongfully rejected as the pursuer in the present case is said to have been*: And even as to the reversal in the House of Lords, there is a singular anecdote with regard to it in the work of *Sir Henry Moncreiff*, so often referred to by Mr. Whigham.

At page 533, in speaking of the argument for Dr. Dick, he says, “ These arguments were completely successful in the Court of Session, who unanimously found that the minister inducted had a legal title to the benefice.

“ The same arguments, afterwards pleaded on an appeal at the bar of the House of Lords, were not equally successful there. Lord Hardwicke, who was then the Lord Chancellor, reversed the judgment of the Court of Session, chiefly on a ground which none of the parties had anticipated; and which, not having at all occurred to the Counsel who had pleaded the case for the respondent, could be met by nothing which had fallen, from the bar,—Lord Hardwicke said, that he could not conceive how a Scotch bishop could have been possessed of a power or jurisdiction, which an English bishop never had. Though the answer is very obvious that they lived under very different constitutions, and as bishops, had in this point and many others, a very different jurisdiction, there was no possible opportunity of making this reply. The decree of reversal was in consequence pronounced; and whether it was well or ill founded, this decision has ever since been held as having laid down the law on the subject.

“ At the same time the following anecdote may be relied on, although, as the question of law is now for such a length of time understood to be settled, it is, perhaps, no longer of any importance.

“ The counsel who pleaded for the presentee to Lanark, and who belonged to the English bar, was so thoroughly convinced that the decision was wrong, and that the Lord Chancellor had misapprehended the point on which he had rested it, that he afterwards asked his Lordship to give him an opportunity, for his own satisfaction, to converse with him privately on the subject

“ He was the more solicitous to have this opportunity, that at first, he had himself been with difficulty persuaded to relinquish his English prejudices, in favour of the powers claimed for the presbyteries in Scotland, and asserted to have belonged to the Scotch bishops; but was ultimately so thoroughly persuaded that the doctrine was sound, that he thought he would either be able to satisfy Lord Hardwicke, that the decision was not founded on law, or would hear from his Lordship a reason to convince him that his own opinion had been too hastily adopted. Lord Hardwicke very readily gave him the opportunity which he requested. The result was that he so completely convinced his Lordship that he had taken up an English idea, not applicable to the law of Scotland, and that the ground on which he chiefly rested his decision was untenable, that he candidly acknowledged his mistake; and requested him to say to the clergyman chiefly concerned, whom he had seen at the bar; that he was afraid he had done him an injury by an involuntary mistake, which he had not the power of correcting; but trusted that he would be candid enough to believe that he had acted conscientiously at the time, and sincerely intended to do justice to all parties.

“ This anecdote the writer of this note received from Dr. Dick, the clergyman in question, a very few weeks before his death.”

In short, in all the cases which have yet been referred to, and in all to which my learned friends have it in their power to refer, there is no instance of this Court ever having interfered, to the effect of controlling the church courts in the matter of induction, or of its attempting to compel the presbytery to examine a presentee. . And yet in all these cases the Court had *de facto refused to try the right presentee*; a remark, which I request your Lordships to keep in view, as I shall have occasion to return to it again: And in the only case in which this court was ever asked to prohibit a presbytery from proceeding by a call at large,—the court refused to meddle with it as being beyond its power. And further, in no case was it ever held competent to litigate with a presbytery about the right to the enjoyment of the stipend.

In leaving this matter of the cases, I would only farther observe, that those which Mr. Whigham quoted as having occurred under the schoolmaster's Acts, are altogether foreign from the purpose. These were cases in which there lies no appeal to the superior church courts, and which are conferred on presbyteries by express acts of parliament, and are in themselves plainly of a civil nature, and so, by necessary consequence, are subject to the jurisdiction of your Lordships, as the supreme civil court; and

yet even as to them, there are thought to be points on which your Lordships cannot judge.

It is quite clear, therefore, that under the act 1567, under every law of the church, and in terms of every decision of this court, although your Lordship's may consider the proceedings of the presbytery to the effect of enabling you to determine the civil question of the right to the stipend; yet the church courts are supreme in their own department, and the case being decided by them, "*shall take end as they decern and declare.*"

Having thus shewn the general principle of the independence of the church courts, and having explained the bearing of the decisions of your Lordships' predecessors upon that subject, I think I might take it for granted that a Call, whatever it may be that is known under that denomination, is a spiritual matter, and beyond the reach of your Lordships' jurisdiction.

But it is said, in the next place, that the act of Assembly 1834 was *ultra vires* of the church, as constituted by the state; and it is maintained that your Lordships may therefore interpose your authority, in order to suppress this usurpation, in consequence of your supereminent right and duty to find a remedy for every wrong for which there may be no other mode of redress.

Now, with all deference to my learned friends, I suspect this is a very rash proposition. It is a very different thing for your Lordships to compel a court, over which you have a natural and necessary jurisdiction, and with regard to matters with which you are accustomed to deal, to perform its duty, even in those cases in which it may have been invested with exclusive jurisdiction; from what it would be to exercise the same authority over another supreme and inherently independent court, and in matters in which you are not accustomed, and, with submission, are not entitled to decide. The question is so beset with difficulties, that I confess the very proposition appears to me to be altogether startling; and I should like to know, how far it would be possible for your Lordships to carry such an exercise of jurisdiction. My learned friends will not tell you how far they expect you to go. They do not state it in their summons, and they have not yet explained it in their argument. Is it meant that your Lordships should assume authority to quash the proceedings of the church courts? Then just suppose you have done so. What more is it that you can possibly do? It is not proposed that you should proceed to try the presentee, or that you should go on to induct him *without trial*. No one has ever imagined that a civil court can perform the first of these acts; and it has never yet been asked, and it is not asked now, that you should do the second. And is not

this a criterion by which to judge of the competency of your Lordships' doing any thing at all with regard to the ecclesiastical part of the procedure ?

In the case of other civil courts, you may competently quash the proceedings, and you can *effectually* ordain them to proceed of new, and with greater correctness; just because, if they are contumacious, and refuse to perform their duty, you can, besides punishing the wrong doers, give the party aggrieved the necessary redress by an act of your own,—either by doing that which the inferior court may have refused or neglected to do, or by doing something else, as in the case of an adjudication, which would be equivalent in its effects to the party. But what could you do in the case of a contumacious presbytery ? Just put the supposition that they were as wrong as it is possible for the human mind to imagine in every part of their conduct relative to the case in question, and suppose that they were determined to submit to all the consequences which could result from perseverance in disobeying the orders of the court. Suppose your Lordships had got them all safe in prison for their contumacy, and that they chose to remain there. What redress would you thereby have afforded to the presentee ? Or how could you possibly supply the consequences of such obstinacy, or, if you will, of such disobedience, on the part of the presbytery ? Is it not the very same thing as if you were called upon to interfere with the proceedings of the court of exchequer, or the court of justiciary, over whom, according to the general rules and principles of the law, you have no jurisdiction ? If it is respectful to make the supposition, just let it be supposed that the court of justiciary should refuse to discharge its duty in any particular point. Or, to assimilate the cases still more ; suppose they should resolve, by act of adjournal, never to try some particular crime, Would your Lordships, though supreme in *civil matters*, ordain them to proceed ? Could you pronounce such an order ?

LORD PRESIDENT,—If the court of justiciary were to decide upon a civil matter, we would interdict them ; and if we were to attempt to try a man for a murder, they would interdict us.

MR. BELL,—Well, my Lord, and if you could, it would be because these were matters within your respective powers, and in which the court interfering with the proceedings of the other would be both entitled and competent to do the thing itself, which is not the case of the proposed interference with the proceedings of the church courts on the present occasion, where you are asked, not merely to determine with regard to the claim to the stipend,—which I have admitted you are entitled to do in any proper action, or even in this action, with the proper party,—but where you are prayed

to find and declare with regard to a matter which is entirely ecclesiastical, and in which you cannot possibly afford any redress by any act of your own, whatever the church courts may think proper to do. And ought the supreme civil court of the country to be asked, or will it submit to pronounce, any judgment in any case to which it cannot possibly give effect by any act of its own; and which, let it be ever so well founded on the merits, must be totally inoperative; awaiting the doubtful remedy of an act of Parliament? for, I again ask, who knows, in these times, when the church is assaulted in all directions, what bill it might be possible to carry through Parliament, if it were once called upon again to legislate in such matters.

Nor will it do to say, that the illustration I have ventured to put of the case of the court of judicary is not a good instance, in respect that the one court is equally supreme in *criminalibus* as the other is in *civilibus*: For you have only to change the term, and the church courts are equally supreme in ecclesiastical as the court of session is in all civil matters. And not merely is it so, but you have there the farther ingredient of a separate legislature; for the church is also by law a legislative body, distinct from that under which your Lordships are constituted, and entitled to act.

I shall not push this matter any farther, as I think what I have already said is altogether unanswerable; but I shall refer to a case in which many of your Lordships were concerned, either as judges or counsel, and which is also, like the instance of the court of judicary, much weaker than the present, both on account of the last consideration, and on account of the nature of the case itself, being that of a civil matter. I mean the case of Warrender, 19th June 1810, touching a proceeding of the court of exchequer, in which it was argued, as an additional reason for your Lordships interposing your authority, that there was a difference in that respect between exchequer cases in which the court of session had been at one time invested with jurisdiction, and those new classes of cases which had never occurred before the Union, nor, consequently, before the establishment of the court of exchequer. The distinction was disregarded by your Lordships. You refused to interfere with the proceedings of the court of exchequer. The present case is *a fortiori* against any such interference. You cannot deal with the ecclesiastical courts any more than you can with the exchequer or the judicary court, excepting when they encroach upon your own province. No fault of the church, let it be ever so glaring, can give any jurisdiction to the civil courts, in *rebus ecclesiasticis*; and whatever may be your Lordships' opinion as to the propriety of what the church has done in enacting the law of 1834, I trust you will never submit to hazard

the dignity of this court, by pronouncing a judgment which you cannot enforce; and which, for any thing you can know, may be contemned by the party against whom it is proposed to direct it.

In the next place, my Lords, even although the church should have acted *ultra vires*, I do not know how the excess can be proved till the supposed compact shall have been better explained; or how your Lordships could possibly interfere till the act 1567 shall have been erased from the statute book, or till it shall have been shewn that the General Assembly have legislated in a matter, not of an ecclesiastical, but of a civil nature.

And this leads me to request your Lordships to attend to the question of the Call; and, with a view to this, you will be pleased to observe what is the duty of the presbytery in the matter of the admission of ministers.

The *first* thing that they do is to receive the patron's presentation, which is a document directed to, and presenting the presentee, to the presbytery, requiring them to take him upon trial; and if found qualified, to ordain, and admit him to the pastoral charge. This is a civil matter, and confers a civil right. Some presbyteries have never been in the habit of attending to the presentation; but in our case we sustained the presentation, which was all that was necessary or competent for us to do with regard to it. There was no occasion, therefore, for any conclusion to that effect; and it is now admitted by the gentlemen on the other side, that the presbytery did all that they could be asked to do in that respect.

Second, The presbytery appoint a day to moderate in the call. This also was done in the present case, but it was an ecclesiastical step with which it would not have been competent for your Lordships to have interfered.

Third, The presbytery sustain or reject the call according to circumstances. In this case they rejected it; and here your Lordships will observe, that *unless* the call is sustained, and *until* it is sustained, the presbytery, to use the words of my learned friend, never even "see or hear the presentee."

If they sustain the call, they proceed, *fourth*, to put him through his trials, which is the first time that they either see or hear him.

If he passes his trials, the *fifth* step is to serve the edict, and the *sixth* is to ordain and collate. But if they do not sustain the call, none of these three last steps can take place, and the presentee is necessarily rejected, and rejected without the presbytery ever having so much as an opportunity of seeing him, in the sense in which the expression was used by my learned friend. Of course, as the call was rejected, my clients performed none of the three last mentioned acts; and the question is, whether the mo-

derating in the call is an ecclesiastical step? And really it would be idle to use argument on such a point. There is no instance of any civil court ever having interfered in any such matter. There is no instance of their ever having been asked to do so, and the pursuers do not require that it should be done on the present occasion, their summons being limited to the taking upon trial, without any mention of its being necessary or proper to sustain the call.

There have been many questions, undoubtedly, in the church courts as to the proper requisites of a call, and I thought my friend Mr. Whigham endeavoured to obscure this part of the case, as if it were doubtful whether such a thing as a call was necessary or not. But he is too much versed in the laws of the church, and has too frequently taken part in the discussions of the General Assembly, not to know, as in fact every Scotch Presbyterian knows, that there is such a thing as a call, and that it is necessarily and invariably required in every case of the ordination and admission of a minister into the Church of Scotland. The origin of the word call in the sense in which it is at present employed, as denoting a necessary and indispensable pre-requisite to induction, may no doubt be disputed; but that the thing has existed, at least from the commencement of the Presbyterian form of church government in Scotland, is altogether unquestionable.

It is proper however to explain, that the call has at different periods been known under different names. At one time it was denominated the consent; at another, the assent; and at another, the concurrence of the people. For more than a century it has been denominated the call. But under whatever denomination it was known, the object of it has always been to warrant the spiritual relationship created by ordination, and to ascertain the acceptability of the presentee, so as to insure his not being admitted against the consent of the people. It is mentioned in the first Book of Discipline, which was prepared by John Knox and his coadjutors, at the very beginning of the Reformation, on 29th May 1560. But as churchmen have been divided in opinion with regard to the authority of that work, I shall begin with the second, which lays down the principles in regard to calls in the most express terms. In speaking of the vocation or calling of ministers, it states, cap. iii. § 4, that "This ordinar and outward *calling* hes twa parts, election and ordination. Election "is the chusing out of a person or persons maist able to the office that vaikes (becomes vacant) be the judgment of the eldership (or presbytery) and *consent* of the congregation, to whom "the person or persons beis appointed." And then in section 5, it is said, thus explaining the reason for the necessity of what is now denominated the call, that "It is to be eschewit that na "person be intrusit in onie of the offices of the kirk *contrar* to

“ *the will of the congregation* to whom they are appointed, or “ without the voice of the eldership.”

And here your Lordships will observe, that this last passage is one of those which are given by Archbishop Spottiswoode, as if it had been a thing thoroughly understood at the time as part of the law of the church : For after quoting it in the precise terms which I have now read, he puts upon the margin opposite to it the word “ agreed,” implying thereby that it was not one of those points on which it was deemed necessary to have the sanction of a new act of Parliament.

The consent of the people, which for brevity's sake I shall continue to denominate by the word *Call*, being thus a part of the process in the ordination of a minister ; and the regulation of that matter being in the power of the church under the old acts of Parliament which I read to your Lordships yesterday, the next authority to which I would refer is in the act of Assembly 1638, confirming a prior act of March 26, 1596, which is in these terms, (art 20), “ Anent the presenting either of pastours or readers, “ and schoolmasters, to particular congregations, that there be a “ respect had to the congregation, and that no person be intruded “ in any office of the kirke, contrare to the will of the congrega- “ tion to which they are appointed.”

The next authority is the act of assembly 1736, cap. 14, which bears,—“ The General Assembly, considering from act of As- “ ssembly, August 6th, 1575. Second Book of Discipline, “ chap. 3, Par. 4, 6, and 8, registrate in the Assembly books, “ and appointed to be subscribed by all ministers, and ratified “ by acts of Parliament, and likewise the act of Assembly “ 1638, December 17th and 18th, and Assembly 1715, act 9th, “ That it is, and has been since the Reformation the principle of “ this church, that no minister shall be intruded into any parish “ contrary to the will of the congregation, do, therefore, seriously “ recommend to all judicatories of this church, to have a due re- “ gard to the said principle in planting vacant congregations; and “ that all presbyteries be at pains to bring about harmony and “ unanimity in congregations, and to avoid every thing that may “ excite or encourage unreasonable exceptions in people against “ a worthy person that may be proposed to be their minister, in “ the present situation and circumstances of the church, so as “ none be intruded into such parishes, as they regard the glory of “ God and edification of the body of Christ.”

These acts of Assembly are used to show the necessity of learning the will or inclination of the people in some way or other, which I affirm without fear of contradiction to have always been through the medium of what is now known under the name of a call. In the meantime I must be permitted to observe, that Sir Henry

Moncreiff has been misapprehended by my learned friend as to this point. His opinion was used on the other side, as if he considered the act of Assembly 1736 as not having been meant to declare the law of the church. But all that he says in the passage which I shall read, only goes to show that the Assembly of that day wished to pare down the call as much as possible ; but at the same time it is plain from the very necessity of enacting it, that it was known and felt to be the law, whether it may have been intended that it should be rigidly enforced on the one hand, or cut down to the lowest limit on the other. All that Sir Henry says on the subject is to be found at p. 448, and is as follows :—

“ It is scarcely conceivable, that this act could have done more, than sooth the discontent of the people by conciliatory language ; unless more could have been attempted than perhaps was practicable ; and unless it had been followed up by a train of authoritative decisions, which was far from being intended. It does appear, however, that, for some years after this time, the sentences of the Assemblies in the settlement of ministers, are expressed in a more guarded and softened tone, than had been usual during some of the preceding years. They discover more solicitude to deal tenderly with the people, and not to irritate their humours by unnecessary exertions of authority. To this extent the enactment appears to have had some effect ; and it ought perhaps in candour to be admitted, that the majority of those who were concerned in it, might at the time have imagined it possible to have done more, to connect the settlement of ministers with the consent of the people, which it supposed to be essential, than was afterwards found practicable, even by themselves. At the same time it is equally evident, that the members of the church who had been most determined in disregarding the opposition made to the induction of presbyters, if they concurred in this enactment, as they seem to have done, could have intended it as nothing more, than a concession *in terminis* to the prejudices of the people, without any view to its influence on their decisions in particular cases, or to such a change of system, as could have had any practical effects.”

Whether therefore the ruling party in the church intended to treat the call in one way or in another, at least it is certain that they admitted that a thing which is denominated a call, was a necessary part of the proceedings in the admission of a minister, and that it was the undoubted law of the church. The same thing was also declared at a much later period, when the ruling party had succeeded in reducing the call very nearly to a mere matter of form, or a piece of waste paper. By act of Assembly 1782, chap. vii. “ Upon a motion that the resolution of Assembly respecting the moderation of calls, should, for the satisfaction of

“ all concerned, be converted into a declaratory act, and printed
 “ amongst the acts of Assembly, the General Assembly agreed
 “ thereto without a vote ; and in terms of said resolution, did, and
 “ hereby do, declare, *that the moderation of a call, in the settlement*
“ of ministers, is agreeable to the immemorial and constitutional
“ practice of this church, and ought to be continued.”

This act of Assembly may serve in some respects as an answer to the idea which, if my friend Mr. Whigham does not himself entertain, I think the train of his argument was calculated to convey, that the act of Parliament 1711 had virtually put an end to calls. Whatever it was that was to be considered as an *effectual call*, at least it is quite clear, that a *call* was then held to be necessary, and it has ever since continued in the most uninterrupted observance. It is mentioned by Sir Henry Moncreiff, in speaking of the period which immediately followed the Act of Parliament, p. 433, that “ in all cases the proceedings of the
 “ church courts were founded *more on the calls, than the presen-*
“ tations.” He gives many instances, both of the existence of the call, and of the power which the church courts exercised in dealing with the matter ; and I close this part of my argument with the observation, that in the very case of Auchtermuchty, on which my learned friends so strongly rely, it was stated, that the cause of the rejection of the patron's presentee *was the insufficiency of the call.*

I now proceed to observe, that although something or other, which is now, and has, for a considerable period, been designated by the name of a call, is the unquestionable law of the church ; there has been much difference of opinion and long continued disputes, as to what it is that constitutes a valid or effectual call. One party, founding on the declarations of the Assembly and the Books of Discipline with regard to intrusion upon congregations against the will of the people, have always maintained, that a call cannot be effectual unless it is signed by a majority of the congregation, or of those who are entitled by the laws of the church to be consulted. The other party treating it as a mere matter of form, have maintained that a call ought to be sustained in all cases, however few the signatures, unless when some positive delinquency or actual incapacity can be alleged against the presentee. Now, how a call by the people should be indispensably necessary, and how it should not be necessary that it should be signed by the people ; Or how the people can be stated as calling when a majority refuses to do so ; does, I must confess, appear to me to be totally irreconcilable with common sense : But Dr. Hill of Dalry, in his *Treatise on the Practice of Church Courts*, shows that the argument has actually been maintained, and that it has been

carried as far as I have now stated it.—At page 570, he observes, “*The call* being laid before the presbytery and read, the first step is to concur with it. Whether the number of signatures attached to it was such as to make it a good and sufficient call, was long a difficult and an agitating question. But there is much less ceremony upon that point at present; and provided *there are signatures attached to a call*, a presbytery does not hesitate to concur with it.”

On this point, Sir Henry Moncreiff quotes a case which I should have been glad to have spared your Lordships the mention of, but my learned friend endeavoured to get rid of it by throwing out a suggestion which I cannot allow to pass unnoticed, viz. that the person who was in that case rejected, was not rejected on account of the want of a sufficient call, but because having been a placed minister before, the presbytery, although, as he says, they could not have refused to sustain the call, were entitled to refuse him permission to leave his former parish, thereby rendering his induction into the new one impossible. I must therefore read the passage from Sir Henry Moncreiff, and it will be found that it does not contain one word of all this; and, that the case was directly the reverse of that which is averred by my learned friend. Sir Henry Moncreiff says at p. 450, “The most remarkable example” (of a call being rejected on account of insufficiency) “occurred in the case of the parish of Currie, in the presbytery of Edinburgh. In 1740, they refused to proceed to the settlement of Mr. Mercer, then minister of Aberdalgie, as presentee to the parish of Currie, though he had been regularly presented by the Magistrates and Town Council of Edinburgh, the undoubted patrons. They set him aside avowedly on account of ‘the difficulties which attended his call’, that is, on account of the general opposition made to him in the parish. They went farther, and followed up their decision by recommending it to the Magistrates of Edinburgh to offer to the parish of Currie a leet of six candidates, and of them to present the individual who should be selected by the majority of heritors and elders. It appears that this advice was followed. Mr. Mercer was no more mentioned, and a minister acceptable to the parish was afterwards inducted. This was a remarkable decision, very unlike the proceedings of Assemblies since 1730; and it furnishes a striking example, in which the Assembly set aside a presentee, to whose life or doctrine no objection whatever could be stated; in which the personal views or interests of the presentee were not at all consulted; and in which the patrons made no attempt whatever to retain the fruits of the benefice; though their presentee was not only not inducted by the church courts, but was, without any literary or moral disqualification, expressly rejected.”

Now, my Lords, I will not, or rather I wish it to be distinctly understood, that I do not pretend to state the exact number of subscribers who have, at any time, been considered necessary to the validity of a call, during the latter years of the history of the Church. I am only, at present, proving the fact, that something which goes by the name of a call was considered indispensable according to the laws and constitution of the Church. The books of the Church are full of examples of it every year; and, without adding to the length of this tedious case, by going through them, I content myself with referring to the recent period of 1781, when two calls were contested on the ground of insufficient concurrence; and I proceed to inquire again, in one word,—can any one, whose views of the matter have not been perverted by ecclesiastical subtleties, which were invented to get the better of what they, at the same time, *were declaring to be the undoubted law of the church*, find common sense in the idea, that a call or concurrence, signed by one or two individuals, or, as has happened in a western presbytery, by nobody at all, should be held as a due fulfilment of the law against intrusion, or of that other law, by which a call is declared to be indispensable.

My learned friend said, strangely enough, that the use of the call, is no more than to afford the people an opportunity of *encouraging* the labours of their future minister. This just shows, how impossible he finds it to deny the truth of my position. It at least admits that a call, whatever it may be that is so designated, is a known and established step in the law of the church. Where and how has he fallen on his discovery? Dr. Hill had no such idea, when he wrote the passage which I have just read to your Lordships. The General Assembly seem to have had none such, when they passed the act 1782. The truth is, that a call was always necessary; and that, at one time, it was always required to be such as should clearly express the mind of the people, upon whom no one was to be intruded against their will. But a long dominant party in the Church, had, by a train of decisions, which led to the secession from the Church, and which were contested every year, till the question was given up for a time in despair, reduced the call to a matter of absolute mockery. The other party, however, which had always wished to render the call effectual, and which had long struggled to do so, had for a quarter of a century been gradually growing in strength, and after many attempts they succeeded in carrying the act of 1834 through the General Assembly.

Now, I would only observe at present, that that act assumes to itself the title of “act anent calls,” and declares, in express terms, that it is a fundamental law of the church, that no man shall be intruded on any congregation, contrary to the will of the people

to whom he is presented. I will show afterwards that the title is not misapplied. It was passed for the very purpose of ascertaining the wish of the people ; and so far from being unfavourable to the presentee, it gives him the benefit of holding every one as consenting who does not expressly declare his dissent. It contains the following provisions :—

“ 7. That if it shall happen that, at the meeting *for moderating in the call*, dissents are tendered by any of the male heads of families, being members of the congregation, and in full communion with the church, their names standing on the roll above referred to, without the assignment of any special objections, such dissents shall either be personally delivered in writing by the person dissenting, or taken down from his oral statement, by the moderator, or clerk of the presbytery.

“ 8. That if the dissents so lodged do not amount in number to the major part of the persons standing on the roll, and if there be no special objections remaining to be considered, the presbytery shall proceed to the trials and settlement, according to the rules of the church.

“ 9. That if it shall appear that dissents have been lodged by an apparent majority of the persons on the said roll, the presbytery shall adjourn the proceedings to another meeting, to be held not less than ten days, nor more than fourteen days, thereafter.

“ 10. That if the presbytery deem it expedient, and the person presented be willing, or if he shall desire so to do, the presbytery shall appoint him to preach to the congregation in the interval.

“ 11. That it shall not be competent to receive any dissents without cause assigned, except such as shall be duly given in at the meeting for moderating in the call as above provided ; but it shall be competent to any person, who may have lodged a dissent at that meeting, to withdraw such dissent at any time before the presbytery shall have given judgment on the effect of the dissents.

“ 12. That, in case the presbytery shall, at the second meeting appointed, find that the major part of the persons entitled to dissent do not adhere to their dissents, or that there is not truly a majority of such persons on the roll dissenting, *they shall sustain the call*, and proceed to the trials and settlement.

“ 13. That, in case the presbytery shall at that meeting find that there is a majority of the persons on the roll still dissenting, it shall be competent to the patron or the presentee, or to any member of the presbytery, to require all or any of the persons so dissenting, to appear before the presbytery, or a committee of their number, at a meeting to be appointed, to take place within ten days at farthest, at some place within the par-

“ish, and there and then to declare, in terms of the resolution of the General Assembly; and if any such person shall fail to appear, after notice shall have been duly given to him, or shall refuse to declare in the terms required, the name of such person shall be struck off the list of persons dissenting, and the presbytery shall determine whether there is still a major part dissenting or not, and proceed accordingly.

“14. That if the presbytery shall find that there is at last a major part of the persons on the roll dissenting, they shall reject the person presented, so far as regards the particular presentation and the occasion of that vacancy in the parish; and shall forthwith direct notice of this their determination to be given to the patron, the presentee, and the elders of the parish.

“15. That if the patron shall give a presentation to another person within the time limited by law, the proceedings shall again take place in the same manner as above laid down, and so on in regard to successive presentations within the time.

“16. That if no presentation shall be given within the limited time, to a person from whose settlement a majority on the roll do not dissent, the presbytery shall then present *jure devoluto*.

“17. That cases of presentation by the presbytery, *jure devoluto*, shall not fall under the operation of the regulations in this and the relative act of Assembly, but shall be proceeded in according to the general laws of the church applicable to such cases. But every person who shall have been previously rejected, shall be considered as disqualified to be presented to that parish, on the occasion of that vacancy.”

The provision with regard to the case of the *jus devolutum* was laid hold of by my learned friend, for the purpose of producing an impression. But he did not venture to use any argument upon it; and it is enough to say, that it was only framed in these terms, because it was thought expedient to put some limit to the use of the veto; and that the presbytery have not attempted to exercise the *jus devolutum* in the present case, and the pursuers have not chosen to insert any conclusion in their summons which can let your Lordships into that part of the question.

Now, it must always be recollected, that I do not consider myself called on to defend the wisdom of the act 1834, in this court. I only say, that be it a good law, or be it the very worst that could have been devised, it is for the present, the undoubted and unquestionable law of the church. We have the authority of Spottiswoode for saying, that it was early admitted that the church had the right both to make and to alter all laws *in rebus ecclesiasticis*. We have the fact, that she has at all times been in the habit of exercising this right. And particularly, it will be ad-

mitted by my learned friends, that she has from time to time, and in a great variety of instances, altered the component parts of that stamp of qualification, which to make their argument consistent with any denial of the church's powers, should have been fixed definitively before the date of the act 1592. Thus blindness, deafness, weakness of voice, ignorance of the Gaelic language in certain parishes, have all been fixed to be proper disqualifications, by express enactments, or by decisions of the church; and they are so reasonable that it is needless to enquire minutely into their origin.

But the church has gone farther than this, and by means of positive enactments, she has added to the stamp, various other particulars which might have been declaimed against, however unreasonably, as limitations on the patron's right of choice as it stood when qualification was first taken notice of. Thus, at one time, it was not even necessary that a presentee should know any thing of the Latin language. This was added. Then Greek. Then a certain proficiency in philosophical and mathematical studies. Then it was required, that whatever might be the proficiency of the presentee, he should also have attended an academical course, of a certain definite endurance. And lastly, it was prescribed, that no one should be admitted who had not attended certain colleges or universities, which were specially designated. So that as the law now stands, the most unrivalled eminence in every branch of study, will not entitle a presentee to ordination, unless that eminence has been acquired in the prescribed form, and by the prescribed method.

Then, my Lords, permit me to ask,—if such a power as I have now been describing, was incontestably in the church, what could be more reasonable than to regulate in the matter of the call which had been so long and so fiercely contested? Just as decisions, now considered by the majority of the church to have been erroneous, had settled the matter in one way, other decisions might have settled it in the other; for your Lordships well know, that a numerous and fluctuating popular assembly, cannot establish legal principles by mere judgments on particular cases, in the same accurate and definite manner as the courts of law. But the Assembly deemed it wiser, not to give room for the contradictory judgments which might be pronounced by the eighty-one presbyteries of the church, which would have led to constant appeals and endless controversies, but to lay down at once a specific and defined law or rule, by which the whole church should be bound. And how was it that they gave effect to this object, and in what respects is it that what they did differs from the reality of the call? Why, instead of enacting that the majority must sign the call, which *it seems to be admitted*

they might have done,—for it is unquestionable that they might have so decided in every individual case,—not in words, perhaps, but in meaning, they declared, in effect, that every one should be held as assenting, that is, as signing the call, who did not positively dissent. This has been popularly misnamed a veto; and my friends have caught at the word, and I must say the mere name appears to me to be the best half of their argument. The act itself bears, that it is ‘anent calls;’ and I shall have no difficulty in showing, that it was the most favourable way in which the church, entertaining the views which it now does, could have settled the matter, for the interests of the patron and his presentee.

Before going into this matter, however, the mention which I have had occasion to make of the power of the church to alter the stamp, another misnomer as I formerly observed, leads me just to suggest, that this matter of acceptability to the people may be considered in another sense, viz. as being of the nature of a qualification. I have shown from the Book of Discipline and the Acts of Assemblies 1596, 1638, and 1736, that acceptability was considered as a necessary ingredient to the admission of a minister. I now beg leave to add the authority of Dr. Cook—differing as I know he does from the views I have been maintaining, and even in the pamphlet which I am about to quote as an authority in my favour—for the assertion, that fitness for a particular parish ought to be required of all ministers. In a work which he published in 1834, under the name of “A few Plain Observations,” he says p. 10, “But the church takes also into consideration, qualification for the discharge of the ministerial duty, and has very distinctly laid down what it conceives this to comprehend. There is a renewed trial and profession of faith and doctrine; but there is something more than this,—something additional to learning, moral character, and sound doctrine. In the Assembly which met in 1596, soon after the establishment of the presbyterian church, and when patronage was the law of the land, we find a series of declarations and resolutions as to what is requisite in a qualified presentee, and these declarations and resolutions were repeated and confirmed anew by the Assembly 1638. I quote them here as forming in fact part of the civil law, or as having the same authority. That this is the case is plain, from no exception to them having been made in subsequent statutes, which is an indirect but virtual confirmation of them: ‘Forasmuch as by the too sudden admission and light trial of persons for the ministry, it cometh to pass, that many scandals fall out in the persons of ministers, be it ordained that in time coming, more diligent inquisition and trial be used of all such persons as shall enter into the ministry.’ Following

where there had been no presentation. I do not know how it was ; but I believe he may be right, and it does not in the least injure my argument. It only makes it the stronger. For then they were cases where the call was all in all, and there *the heads of families were counted*, and yet you are now to be told that heads of families were never before heard of in the church. Your Lordship will find the instances adduced by Mr. Whigham in the appendix to the report of the committee to which I have referred.

But then, it seems, that we actually refused to judge in the matter. And so because we obeyed the law of our ecclesiastical superiors, we are in a much worse situation than if we had judged, and judged amiss. But, where does my learned friend find it written in any act of parliament, that we *must judge* at all. Does he not see, that the very thing is contemplated as possible in 1592, that presbyteries *might refuse and wrongfully refuse to judge*. And where is any other consequence annexed to the refusal, but the retention of the stipend, upon which I maintain that my clients have no interest, and are therefore not entitled to use any argument. Where, I ask, does he find that we can judge legally, *unless where there has been a valid call* ; and where is the difference between the call, and the so-named veto, excepting that when the call is a real entity, the veto is the most favourable of the two. And above all, I ask my learned friend, will he point out in any one of the cases relied on, —in any case in the books,—one instance of a presentation *wrongfully rejected, where the presbytery did not refuse to judge*. In every case where they tried the wrong presentee, they decidedly refused to try or judge of the qualifications of the right one ; and what does it signify whether a presbytery sustain a presentation, and refuse to judge, in compliance with a general law which they dare not disobey, or wrongfully reject a presentation, and so examine the wrong person.

Thursday, 30th November.

When I was stopped yesterday, I had been adverting to numerous objections taken, by the gentlemen on the other side, to the act of assembly 1834 : But before continuing that course of argument, there are one or two observations which I wish to make, with the permission of the Court.

It appeared, from some questions which were put to me yesterday, that some of your Lordships wished to know something more about the meaning of the *call*, and of the nature of the writing or instrument which is now so denominated, and which is meant to ascertain or express what has been at different times differently denominated, as the assent, the consent, the concurrence, or the call by the people. It may be proper, therefore, to observe, that there is a union of two distinct and separate characters, which are constituted

in distinctly different manners, and which produce different effects in the appointment of a minister of the gospel. The one is temporal, the other spiritual. The *temporal* character, according to the constitution of the Church of Scotland, is given by the presentation of the patron, or other party or parties who may, at the time, or in the circumstances, have the right of nomination. The *spiritual* character, which is equally indispensable as the other, consists of ordination, and can only be given in consequence of what I have now been speaking of, viz. the call by the people. The spiritual relationship cannot be created without it in any case whatsoever. Both characters may be conferred, in certain cases, *without any presentation*, as was the case during the periods which followed 1649 and 1690, on which I will still have to offer some remarks. But there has never, from the beginning, been even a single instance of its having been done *without the call*; and my friends will not pretend that there ever has.

Having made this explanation, which, from the great familiarity which the Court in general has with the proceedings of the General Assembly, had not previously occurred to me to be necessary, I shall now draw the attention of your Lordships to the form of a call. I take the first that comes to my hand from the work of Pardovan, which was published between the years 1690 and 1711, when there was no private patronage, and when there was, consequently, no proper presentation. In this way, it happens that there is some difference in the modern form from the one formerly employed, corresponding to the parties, who were entitled to be the callers at that time, and those who are the callers now. The older form was, that the heritors,—or in case of burgh churches, the magistrates,—had the right of nominating, and they, together with the parishioners, were the callers. Under the existing law, the patron has the nomination, and the same parties as formerly give the call. I read from the form used in a burgh; but *mutatis mutandis*, the form has been the same in every case, and at all times, and has always been quite irrespective and independent of the existence or non-existence of a presentation. It is given by Pardovan, b. 1. c. 1. s. 7. and will be found in Peterkin, vol. 1. p. 176:—"We the heritors, elders, and magistrates of the town council of —, being destitute of a fixed pastor, and being most assured by good information, and our own experience, of the ministerial abilities, piety, and literature, and prudence, as also of the suitableness, to our capacities, of the gifts of you, Mr. A. B., preacher of the gospel, or minister, at C., have agreed, with the advice and consent of the parishioners foresaid, and concurrence of the reverend presbytery of D. to invite, call and intreat, likeas we by these presents do heartily invite, call and intreat you, to undertake the office of a pastor among us, and the charge of our souls. And

“ further, upon your accepting of this our call, promise you all dutiful respect, encouragement and obedience in the Lord. In witness whereof,” &c.

LORD GILLIES.—What was the date of the earliest call which was given in the Church of Scotland, and what were its terms ?

MR. BELL.—I do not know the date of the earliest call that may have been preserved. Dr. Lee, who is our best authority in all matters connected with the antiquarianism of the church, has told me that he never saw one more ancient than 1596 ; but, as indeed we are all quite aware, from its being mentioned in the time of John Knox, that they existed from the beginning, or from the time of the First Book of Discipline in 1560 ; and at all events they were in use prior to the act of 1592. And although I have no earlier form by me than that which I have read, and have not in my memory the terms of that mentioned by Dr. Lee, I call on my friends on the other side to admit, as I am sure they will, that the form has always been that which I have read.

The call having been sustained by the presbytery, is presented to the presentee, who is specially required by the minister who moderates in the call, to say whether he accepts of that call, and whether he has used any means to obtain it. And having given satisfactory answers to that and other questions, the presbytery proceed to the discharge of the remaining parts of their functions.

I would now, my Lords, take leave to observe, that I think I have sufficiently established, that as the law now stands, (to use the words of the act 1567,) the examination and admission of ministers is only in the power of the kirk ; and that if the inferior judicatories refuse to admit a person presented to them, there shall be an appeal to the Assembly of this haill realm, by whom the cause being decided, shall take end as they decern and declare.

LORD GILLIES.—That act was passed before presbytery was established.

MR. BELL.—No, my Lords ; presbytery was established from the beginning. Certainly, as his Lordship observes, *the particular court called the presbytery*, was not established as it exists at present till 1578, or rather till 1581.

LORD GILLIES.—Then by what act of Parliament was it given to the presbyteries ?

MR. BELL.—Why, my Lord, there is no act by which the call is established ; or by which the direct power in that particular matter is given to the presbyteries as a part of the whole church,—and that is just my case. My friends must show some act of parliament *by which it is taken away*. The whole argument I have addressed to your Lordship has been an endeavour to show that the presbyteries must have that power, and that it flows from the state.

I have shown that the act of 1567 provided that the whole matter should be solely in the power of the kirk, as then by law established. Presbyteries were created after that, and they form a subordinate court to the whole kirk; and the act 1592 expressly declares, that the whole powers of the kirk, whatever they were, were to be exercised respectively by presbyteries, and synods, and General Assemblies. And as to presbyteries in particular, it provides that they shall cause the ordinances made by the Assemblies provincials, nationals and generals, to be kept, and put in execution. I have shown, that these powers having been thus committed to the kirk, the First Book of Discipline, or the Book of Policy as it was called, was prepared so early as 1560, before the act 1567 was consented to by the crown, but after it was passed. I have shown that the Second Book of Discipline, prepared after this power was conferred, speaks of calls. It mentions the thing in a double sense; first, there is the inward calling in a man's own mind, which comes from a higher source; and second, there is the outward calling or vocation, which consists of two parts, the judgment of the eldership, and the consent of the congregation. I have shown that even then they declared, that no man should be intruded on any congregation, contrary to the will of the people, and that this has been renewed from Assembly to Assembly, at all periods of the church, beginning at least from 1581, when they approved of the Book of Discipline, down to the disputed act of 1834. I have shown in the next place, that the instrument now denominated a call, is merely the mode devised by the church, for ascertaining the question of fact, whether the presentee has, or has not, the consent, assent, or concurrence of the people; and so whether he is, or is not, intruded on them, against their will. I have shown that in all time the church has made laws for itself without objection, and without any contradiction or check on the part of the state; and which, as Dr. Cook himself tells us in the passage which I formerly read, must now be considered as part of the civil law of the country. I have shown, from Archbishop Spottiswoode, that the power of *abrogating laws* was claimed in 1578, and that it was granted then, among the points for which it was not necessary to go to parliament, on the express ground, *that the church had undoubtedly the power of making laws*. I have shown, therefore, that the power of the kirk in this matter does not depend on the act 1592, which only included presbyteries among the constituent parts of "the kirk;" and the power thus claimed and admitted in 1578, not having been repealed or denied in 1592, is just one of the reasons why I maintain the power of the church to enact the law of 1834. There is not even an expression of a doubt in *the charter* on the subject; and there has been a constant and invariable practice ever since, extending now to a period of nearly two centuries and a half, of the church legislating on

all such matters. I will not return to these topics ; I merely refer to the Books of Discipline, and to the acts of Assembly 1596, 1638, 1736, and 1782. I have farther endeavoured to show, that there were two parties in the church ; one of whom wished to reduce the call to a mere nonentity, in which they succeeded so far that there have been instances of calls being sustained with only one signature, and as I have mentioned, even without any signature at all. But I am not speaking of what may have been the wish or the success of any particular party. I do not care whether the laws which they were under the necessity of enacting, were intended by the framers of them to be efficient or not. In declaring *that such was the law*, they admitted the fact for which I have been contending, and Doctor Cook himself is among the number of my authorities.

I hold it therefore, my Lords, to be quite indisputable, that the church has uniformly exercised the power of legislating, and deciding whether there has been a proper assent, consent, concurrence, or call on the part of the people, and that however they may have differed at times upon the requisites or the mode of it, she must have the power of fixing how the propriety or sufficiency of that call shall be ascertained ; and the question just comes to be, whether the act 1834 effects the purpose of ascertaining, in a satisfactory manner, whether there was a consent or not. I do not admit the relevancy of the question, for I abide entirely by what I have already said of the incompetency of your Lordships to take into view the propriety or impropriety of the laws of the church ; nay, even of your doing so if the enactment had been *ultra vires*. But even on the supposition that I am wrong as to the consequences of excess of powers, I say that the act 1834 was no excess. It was a mere mode of ascertaining that which they were bound to ascertain. It was their duty to devise the best means they could of *proving* whether there was a sufficient concurrence. And whether the mode was imperfect, or whether being perfect, they misjudged the import of the proof when led, still it was clearly *in re ecclesiastica*, and your Lordships have no power to interfere.

I proceed to observe, that from 1711 till a very recent period, there had been much agitation on the question, what extent of concurrence was necessary ? And in all corners of the country there were presbyteries who never ceased to maintain that an actual majority should concur. The act 1834 was passed to settle this question, and your Lordships have heard what has been said against it. I do not return upon what I stated yesterday. It is said that a power different from the church courts is interposed between the presbytery and the presentee : I just ask in one word, would there not have been a power interposed, if the Assembly had declared *that the call must be signed by a majority*, which my friends admit they might have done. In truth, the act 1834

is more favourable for the patron and his presentee than the mode for which my friends contend, understood as it now is by the church, would have proved. It holds every man as concurring who does not take the trouble of coming forward to dissent, and besides of undergoing various questions and ceremonies as laid down in the regulations. Whereas, under the interpretation of the call, as it stood till that act was passed, which the church would now, in all probability, have been inclined to adopt, it would have been necessary for an actual majority to concur. And I ask, in one word, whether it is not infinitely more favourable to the presentee to hold all absentees as consenting, than to put *a stranger* to the risk of its being said, "If he has not friends who know him, why should I take trouble in the matter" and to hold all who reasoned or acted in this way, as voting against him.

My friends, however, are not content with this. They take much stronger ground, and would hold all persons as concurring, *however strenuous and determined their opposition may be*, unless they can support it by reasons which shall be satisfactory to a different body of men. Now really, my Lords, this does appear to me to be rather a strong presumption. Is this a way of ascertaining "the will of the people," for that is the word? Besides, it is utter nonsense. A minority—an individual—*can object upon showing cause*. Then why should there have been any such enactment about the majority? How could it ever have been thought of, if they were to have no greater privilege than the minority? I say it would be an interpolation in the acts of Assembly of what never could have been omitted by the framers of them, if it had been their meaning, when they framed them, to hold that the law is what is contended for by my learned friends.

My friend, however, told your Lordships that this has always been the understanding; and he even told you that if there ever was such a thing as a real call, it was only during two short periods of time, the one extending from 1649 to 1660, and the other from 1690 to 1711; and that the provisions of these years were finally put an end to or rendered ineffectual by the act 1711.

One general answer to this is, that I have taken my authorities from all ages of the church, and that the instances drawn from Sir Henry Moncreiff have almost all of them occurred since 1711, not to mention that I have brought them down to 1782. The act 1649, in particular, which it will be observed, *was not repealed* by the rescissory act like the act of Parliament of the same year, is a direct authority in favour of the view which I take regarding the use of a dissent such as is now called a *reto*, in preference to a positive consent of the people. And I mention it the rather, 1st, Because it throws some light on the question of the call; and, 2d, Because I heard Doctor Cook himself state in the General Assembly,

that the law of 1649, to which I am now referring, still continues to be the law of the church in the matter of admission, substituting only the presentation of patrons for the nomination by the elders. He directly maintained the proposition which I now state, and put his case, not on any denial of the authority of the act, but on the mode in which it ought to be interpreted, and on that I am directly at issue with him.

Now, as I am to submit that no one not long accustomed to listen to the speeches of those who are now the minority of the General Assembly, could ever dream of its being possible to put two interpretations upon this act of Assembly, I shall take leave to read those parts of it which relate to the present question. It begins with directing intimation to be made, that the presbytery will send preachers to be heard by the people, and then it proceeds—Peterkin's Compendium, vol. ii. p. 69 :—" Within some competent time there-
 " after, the presbytery is again to send one or more of their num-
 " ber to the said vacant congregation, on a certain day appointed
 " before for that effect, who are to convene to hear sermon the fore-
 " said day ; which being ended, and intimation being made by the
 " minister, they are to go about the election of a pastor for the con-
 " gregation, the session of that congregation shall meet and pro-
 " ceed to the election, the action being moderated by him that
 " preached : And if the people shall, upon the intimation of the
 " person agreed upon by the session, acquiesce and consent to the
 " said person, then, the matter being reported to the presbytery by
 " commissioners sent from the session, they are to proceed to the
 " trial of the person thus elected, and finding him qualified, to ad-
 " mit him to the ministry in the said congregation. 3. But if it
 " happen that the major part of the congregation dissent from the
 " person agreed upon by the session, in that case the matter shall
 " be brought unto the presbytery, who shall judge of the same ;
 " (Here your Lordships have the very thing which is now called the
veto ;) and if they do not find their dissent to be grounded upon
 " causeless prejudices, they are to appoint a new election in man-
 " ner above specified. 4. But if a lesser part of the session or con-
 " gregation shew their dissent from the election, without excep-
 " tions relevant and verified to the presbytery, notwithstanding
 " thereof, the presbytery shall go on to the trials and ordination of
 " the person elected ; yet all possible diligence and tenderness
 " must be used to bring all persons to an harmonious agreement."

Now your Lordships will have perceived, that there are in this act two perfectly separate and distinct provisions for a dissent or veto on the part of the people ; the one in the case of a majority, and the other in the case of a minority dissenting. It plainly never could be meant that they were to be dealt with exactly in the same manner. In the case of the minority, the words are not merely

that the reasons of dissent shall be *verified*, but that they shall be *relevant*; and it must have been meant that the majority might dissent *without reasons, either relevant or verified*. I say it is impossible for all the ingenuity of my learned friends to get over this distinction. And I ask, in what did this kind of dissent differ from the veto? Why, only in this, that if the presbytery “did not find” the dissent to be founded on causeless prejudice, they were to proceed to a new election. In so far as concerns the mere fact of there being causeless prejudices or not, a similar object was in view by the declaration at the end of the act 1834,—“that no person shall be held to be entitled to disapprove as aforesaid, who shall refuse, if required, solemnly to declare, in presence of the presbytery, that he is actuated by no factious or malicious motive, but solely by a conscientious regard to the spiritual interests of himself or the congregation;” and by the charge in the last regulation to presbyteries to use their utmost endeavours to bring about harmony and unanimity. The methods employed were different, but the objects in view were substantially the same.

But it was this very phrase ‘causeless prejudices’ which enabled an overruling majority to get the better of the act 1649 altogether, as for a time it is well known they did. And who was to prove those causeless prejudices? Unquestionably not the majority; for then, in the very face of the act they must have shown that their objections *were relevant*, and then they must have gone on to *verify* them. It was just a permission to the presbytery or the elders to prove, if they could, (by examining the people certainly,) that there were causeless prejudices; but if they could not prove this, then the dissent, or, in other words, the veto, was to be effectual. And I shall only add upon this point, that it is quite manifest, that the majority were to be consulted in their feelings and wishes, which was not the case with the minority; and I am sure I need not tell your Lordships, that there are many objections which may be undeniably well founded, such as ignorance, indifference, weakness of intellect, uncertainty of doctrine, which may altogether drive the people from the church,—objections which may be obvious enough, but which cannot be shown to be legally relevant, and which most unquestionably might never admit of verification to the apprehension of third parties, who would be bound to decide on legal proofs.

It is upon this point that my learned friends have both now and formerly made the most undue use of the name of Sir Henry Moncreiff. It is necessary, therefore, to observe, that he obviously had not had the act of assembly before him when he wrote the passage to which they refer; for he says, that the majority were bound to give in their reasons to the presbytery, whereas, in point of fact,

there is no such thing mentioned or hinted at in the act ; and, on the contrary, the rule was just the reverse.

The act of Parliament 1690, c. 23. again, had a call or consent of its own ; and I admit that it was then necessary for all objectors to give in reasons to the presbytery ; but I do not enter into the particulars, because my learned friends say it never worked well : And although I cannot agree with them in that, I agree that it was entirely repealed as to patronage, by the act 1711 ; and therefore I shall only observe, with regard to it, that the very fact of its having then been deemed necessary to provide that the objectors should *prove their reasons*, when no such provision was ever made either before or since, just shows that it could not have then been the understanding that such was the true interpretation of the common law of the church.

In this very long case I do not trouble your Lordships with a formal recapitulation of the different heads of my argument. I apprehend I have established, that the matter brought under your notice by the summons is purely of an ecclesiastical nature ; and that your Lordships have no jurisdiction to redress any wrong which may have been done by the church courts, thus acting in a matter in which, by law and practice, their powers are equally supreme as those of your Lordships are within your own department ; and that you could not interfere as against the presbytery, even if there had been an excess of power, provided at least that such excess were only in an ecclesiastical matter. And without departing from these defences, the unusual nature of the case, and the long period of time which has elapsed since any question of the kind occurred in this court, has also induced me to say more than I would otherwise have thought proper, as to the meaning, effect, and alleged novelty or excess in the act itself. On all the grounds which I have argued, I submit I am entitled to a judgment, finding that your Lordships have no jurisdiction in this matter ; and that the summons, in so far as it is directed against the presbytery, must necessarily be dismissed.

But the same consideration which I have last adverted to, has also led me to discuss the *merits*, if I may call questions of jurisdiction and competency by that name, in the first instance ; and I am now to submit certain other pleas, which in an ordinary case, ought properly to have taken precedence of those which I have already considered.

In the first place, then, my Lords, I apprehend that the pursuers

are barred from insisting in the present action, in respect of their having acquiesced in the proceedings of the presbytery, in as far as it appears that the presentee did not object or express any disapprobation to the presbytery proceeding in the matter, in obedience to the injunctions of the act of Assembly ; but on the contrary, that his objection was against their either receiving “ or acting upon “ said roll, inasmuch as the same was not made up either within “ the time or in the manner prescribed by the act of Assembly.”

2nd. I submit, in the next place, that the pursuers have no right, and would have had no right, to apply to this Court for redress against any injury, real or supposed, in respect that they did not follow out the provision of the act of Parliament 1567, cap. 7. which declares that there shall be an appeal to the General Assembly of the haill realm, by whom the case being decided, shall take end as they decern and declare ; and, without detaining your Lordships by reading the authorities, I hold it to be settled law, that even where your jurisdiction is undoubted, you cannot give redress where the prescribed statutory remedy has not first been resorted to by the person aggrieved. I refer to the case of Cook reported by Shaw, vol. ii. p. 317, and to another on 2d December 1828, in the seventh volume of the same collection, page 117, as quite sufficient to bear me out in this position.

3d. In the third place, my Lords, I submit that the summons, even after all its amendments, is not relevantly laid as against the presbytery, for whom only I have the honour of attending your Lordships, and whose case it was agreed should be argued and decided in the first place, before taking up the cases of those other parties for whom I do not appear. The decisions relied on by both the parties in the course of this argument, and apparently with great confidence, besides showing, as I have already submitted, that your Lordships have no jurisdiction to interfere at all in any question which is purely ecclesiastical, whatever may be the extent of the injury which may have been done, do also establish the principle which has always been admitted by my clients, that in so far as a matter of civil right is concerned, your Lordships have a jurisdiction to consider even the ecclesiastical part of the question, but solely as it was expressed in the case of Auchtermuchty, *ad hunc effectum* of enabling you to get at the question of civil right, upon which you are not only entitled, but are bound, in virtue of your office, to decide. But then, what I say is, that you cannot do this *in a question with the presbytery*. It is not my business to say who may have right to the stipend. For my clients, I do say, that they do not ask it ; that they never will ask it ; and that they never can ask it, on any pretence whatsoever. The case of Dunse shows that that is a point

upon which it is incompetent to declare *against the presbytery* in any form, or to any effect whatever ; and all the cases, from the earliest to the latest, show that it is a point upon which you can decide without the presence of the presbytery, and without their being parties to the procedure.

Then why are the presbytery called in this action, when it is certain that your Lordships cannot possibly ordain them to do any thing whatever ? When, in point of fact, you are not asked to pronounce any order of any kind against them, and when it is quite certain that no judgment, whether declaratory or otherwise, which you might pronounce, even if your powers were undoubted, could form a *res judicata* against any of the other parties who have been called in the action, or against any party who may yet come to have an interest in the stipend. In short, excepting when a presbytery has acted in so far in a civil capacity, by exercising the *jus devolutum*, this Court never has interfered with their proceedings ; and I am quite sure that your Lordships would not do so now, even if my friends had libelled their summons so as to put that in your power, which they have not done.

Then why are we to be called upon to argue a naked declarator, which leads to no consequences—which can lead to none as in a question against us—where your Lordships are exposed, on the one hand, to the risk of pronouncing a decision which must for ever remain inoperative ; and where, on the other, it is not in the least degree necessary, to enable you to decide the questions still remaining between the patron, the presentee, the trustees for the Widows' Fund, and the heritors. I know very well that the cases are not similar in all respects, and do not mean to read them, as they are stated in the papers, and were of so recent occurrence, that they must be familiar in the recollection of all your Lordships. But in the view I have last taken, I venture to submit, that you cannot treat the question otherwise, in so far as concerns the presbytery, than you did the well-known cases of Orkney and Shetland, and of Lisle, where you refused to decern in declarators, not for incompetency or want of jurisdiction, but because they could lead to no result of a practical nature ; and I have only farther to observe, that what renders these cases the more applicable in the present instance is, that the pursuers have chosen to take the argument, as if they were to be unsuccessful in the question which is still before them with the trustees for the Widows' Fund, so that nothing could possibly be obtained by a decision on the merits, in the question with my clients, but that collision of jurisdictions, which I earnestly trust your Lordships will consider well before you engage in.

Tuesday, December 5th 1837.

THE LORD PRESIDENT.—“DEAN OF FACULTY.”

THE DEAN OF FACULTY.—MY LORD—I begin without one word of preface,—assuring your Lordships that I am fully impressed with the fact that you are now engaged,—not in an historical discussion, but—in the trial of a civil action, and entreating your Lordships, if I have earned any character with you for the desire of looking to my business with business views, to give me credit throughout my argument, for the intention at least of bringing every word of it to bear practically, not only on the questions raised in this cause, but on the Conclusions in the Summons on which I ask decree.

The discussion, as it has hitherto been conducted, seems to involve four general points,—

1. The legality and competency of the Act by the Church, which gives to the people a veto on the patron's selection of a presentee.

2. Admitting the illegality of this act, has this Court jurisdiction to declare the wrong and the rights of the parties injured, and to give redress—to any, and to what extent and effect?

3. Admitting the illegality and the jurisdiction, does this Summons ask for the interposition of the Court in the way, to the effect, and against the parties, which the jurisdiction possessed requires and involves?

4. Are the pursuers barred, by personal exception founded on alleged acquiescence, from insisting in a competent action with competent conclusions?

I concur with Mr Bell, that both of the latter points must be taken in this order. The mode of exercising, and the effect of, the jurisdiction, if possessed by the Court, and the parties with whom the points ought to be tried, will best be understood when the legality of the act, and the nature of the jurisdiction are ascertained; And the effect of the supposed personal exception,—which will give the Court little trouble,—can only be understood when the other points have been discussed. I shall follow the same order.

Your Lordships will notice the peculiar *condition* of the argument as it arises on each of these points.

The legality of the act of Assembly is one distinct point. But then the question as to the general jurisdiction of the Court must be argued on the assumption of the *illegality* of the act of which we complain, and of a great and unconstitutional usurpation of power by the Church, in a matter involving civil rights. Such must be the *condition of the argument* on the point as to the jurisdiction of the Court. Again,—the objections stated to this par-

ticular summons must plainly grant to me the general jurisdiction of the Court.

It will be found to be of most vital importance in the discussion of the second and third points, to have distinctly in view the condition on which the argument of the defenders on these points must proceed.

Some most important admissions have been made by Mr Bell, which it is essentially necessary in the very outset to put distinctly before the Court,—admissions made with the deliberation which the long management of this discussion, not only in this cause but elsewhere, implies, and to which his thorough acquaintance with every part of the subject attaches the greatest weight and authority.

The admissions by Mr Bell were :—

1. That this Court is entitled to inquire into and ascertain the law of the Church, so far as necessary to explicate whatever civil jurisdiction the Court possesses.

2. That the civil court must judge whether the point on which the Church claims the power of legislation or of jurisdiction, is spiritual or temporal, as he phrased it,—I would say ecclesiastical or civil.

3. That in all civil questions, this Court is entitled to judge whether the presentation is effectual. Mr Bell limited, I know, the consequences which are to follow from such jurisdiction of the civil court. The admission, however, of this point was distinctly made, and the Court will judge of the grounds for limiting the jurisdiction thus conceded.

4. That the Church cannot interfere with civil rights arising out of patronage.

5. Generally, the law was admitted to be settled, that the Court might hold the patron of the legal presentee entitled to the stipend and temporalities, though another has been inducted or ordained.

Mr BELL,—No. That was not my admission. I admitted that the Court might *withhold* from the person inducted by the Church the stipend.

DEAN OF FACULTY.—I accept the correction. I am willing so to word the admission, and I think *that mode* of stating it illustrates *more* strongly its importance, and more emphatically shows the extent of the jurisdiction conceded, when it goes the length of admitting as legal and settled that anomalous result, namely, that the Court is entitled to deny effect to the induction by the Church, and to withhold from the person ordained to the cure, if in *their* opinion illegally inducted, the right to the stipend, which forms part of the benefice.

I may here generally remark, that a very slight consideration

of this last admission, worded as my friend wishes, shows,—1. The extent of the jurisdiction of the civil court, and 2. The unsoundness of the argument which claims *finality* for the decisions of the ecclesiastical courts, in admitting, or refusing to admit, the presentee, and in granting induction,—since even the irrevocable act of induction does not establish or carry with it the effects which, on the notion of finality, it ought to have. 3. That the collision so much deprecated has taken place in the worst of all cases, *after induction*—not when the Court was in a situation to prevent wrong, but after induction,—and even then, in this most unfavourable of all cases for your interposition, when the parties have not come to you, it might be said, in time, the Court have not even then hesitated to decide, and to give all the redress then possible. The case *here* is infinitely more favourable, as I shall afterwards show, for the jurisdiction we contend for.

On the importance of these admissions, I presume, I need not dwell. The case has been already so fully under the view of the Court, that your Lordships will see the bearing they have on every part of the case, and the immense aid thus given me in making out the points which are contested.

Before entering on the more regular part of argument, I wish to present one (comparatively) short, but in itself sufficient view of the first two questions,—viz. the Legality of the Veto, and the Jurisdiction of the Court. For convenience and precision, I will state that view in distinct propositions. I intend to show,—

I. That the Act of Assembly 1834, in its main *principle*, and *on the face of its regulations*, raises and disposes of questions of *civil right*, the determination of which belongs to the civil court, and the determination of which involves the whole question as to the legality and competency of the act, and the jurisdiction of this Court. The sweeping disposal of a question of civil right, the *jus devolutum* of the Presbytery, will be found to be at the root of the act of Assembly.

With this proposition I propose at present to combine another, viz.—

II. That, on the face of the act itself, the right of peremptory rejection given to a portion of the congregation is *as distinct and separate from the call*, as it is unauthorized by the nature of a call, or any enactments regarding calls. I say, that the veto is, on the face of the act of Assembly, wholly distinct and separate from a call, and does not partake of its nature, or fall within the meaning of a call.

I have now to call your attention to the Act of Assembly. And *first*, let me ask,—1. Is it *legislation* or not? It is surely right to know this from its defenders. It is very necessary to decide upon the character of the act—as legislation or not—for that point enters into the essence of the question as to the competency of the Church to introduce or sanction the veto. Now I doubt if the

Court are yet sure what the defenders mean to say as to this point,—whether they avow the act to be legislation or not. In page 8 of the Defender's Case,—again in page 43, (the important proposition read by Mr Whigham,) and in one part, but not in every part, of Mr Bell's argument, the defence of the Veto is rested wholly on a power to legislate, claimed for the Church, to the extent of such a change.

But if not legislation, then *second*,—Is it *declaratory* of Law? Then two things must be kept in view.—(1.) It is of law which must be taken in connection with the civil right of patronage, and the statutory enactments on that subject; and (2.) If declaratory of existing law, it is clear that it must then be shown not to be a *new measure*; for if the measure is new, and effects a change, then clear it is that the Act of Assembly cannot be declaratory of any existing law, when no such veto was previously known.

Now, then, in reference to the view stated in the two propositions I have announced, let us look to this act of Assembly.

See Appen-
dix to this
Report,
No. I.

Turn to Appendix pursuer's Case, p. 13.

There is first the declaration,—“That it is a fundamental law of this Church, that no pastor shall be intruded on any *congregation* contrary to the *will* of the *people*.”

This declaration, then, is made on the face of the act, the test of its legality. Mr Bell admits, that to explicate your civil jurisdiction, you must consider, 1. What is the law of the Church; 2. What is spiritual or ecclesiastical, and what is civil. Hence, then, let us see what are the civil questions raised on the face of this Act of Assembly?

But let me ask in passing, as of great importance to both of these points,—Is the term *people* the same as *congregation* or not? When and how is this term defined? What law decides and defines the portion of the people, or makes a distinction between one portion and another?

“*Will* of the *people*.”—This is singular phraseology, very loose, very wide, considering the subsequent limitation of the alleged rights to a *specific portion* of the congregation, far short of the *people* in any church sense of the term. To me, I own, it wears too much the semblance of that preposterous and alarming doctrine of the *Divine rights* of “the Christian People,” which Sir Henry Moncreiff, (in the work so often quoted,) justly and strongly condemns as inconsistent with every sound principle of Presbytery, and repugnant to the whole system of its establishment in Scotland:—But I point to the phraseology in this solemn declaration, as plainly indicating some very wild or very confused notions at the bottom of this ill-advised measure, and very likely to lead its authors into extravagant excess of power when so influenced and misled.

Then the Act proceeds—

2. “And in order that this *principle* may be carried into *full*

“*effect*,” &c. Conceive the absurdity of putting then this measure in the form of a *declaratory* act. The Church found at once, that *new machinery and regulations, new measures* were necessary to give effect to this assertion; in other words, to give and bestow this abstract right:—Surely a tolerably strong proof that this is not a fundamental law, if, in 1834, the Church had to devise machinery, in order to let this principle for the first time work. It is not pretended that the machinery adopted is a re-enactment of any corresponding regulations, or that in any one law or act a regulation exists, providing for peremptory rejection. No: The Church is above disguise as to this. Fundamental as they say the law is—now, at this date in the Church for the first time, they must contrive, invent, and introduce the form,—the machinery,—the way and the time—formaking this law tell and operate. How strange a result. This is plain, that regulations alone can accomplish such an end as the peremptory rejection of a presentee. If there is no mode in existence of expressing or enforcing such rejection,—if there is no regulation, in short, on the subject,—no rule which says the majority, or two-thirds, or one-third shall reject, it is clear that the law has not existed: that the change is as new as it is bold and sweeping. Hence, it is ludicrous to speak of a fundamental law having previously existed, if no means, power, or scheme was previously known for carrying it into effect. The very terms of the act then condemn it. This declaration of a Fundamental Law is a mere pretext. Law there can be none—when, in this very act they are obliged, for the first time, to set about devising the *time* and the *method* of exercising this power of rejection, and to settle *to whom* the power actually is to be entrusted.

3. The act proceeds: “In order that this principle may be carried into *full effect*, the General Assembly, &c. ordain, that it shall be an instruction to presbyteries that, if *at the moderating* in a call to a vacant pastoral charge, the major part of the male heads of families, &c. shall *disapprove* of the person.” &c. “such disapproval shall be deemed *sufficient* ground for the presbytery *rejecting* such person, and he *shall* be rejected accordingly.” The terms here employed are very important: True, the *time* and occasion of moderating a call is chosen in order to give a colour to the new scheme: But even in the face of the Act, this right to disapprove or reject is no part of a call. The call is equally moderated, even though the veto is exercised:—And the call may be signed, aye by a great majority of the congregation, and yet the presentee may be vetoed. The Call is an expression of *assent*. How far actual signatures or what amount of assent has ever in the views of some been required is a different point. But the call is an expression of assent, and only an expression of assent. The form imports this. The ob-

ject ascribed to the form imports this. The substance of the thing imports this.

Let us take the form of the call as used and settled in the Presbytery of Edinburgh, and I believe in the style generally in observance. You will find it on p. 25 of an additional appendix, which I beg to send copies of to the Court.

"We, the undersigned *heritors*, elders, heads of families," and (observe) "*other inhabitants of the parish of C., &c.*" Here it is supposed to be an expression on the part of *all* or *any* parishioners, not limited to heads or male heads of families. Then—"being satisfied with the gifts, piety, &c. of you, A. B., preacher of the gospel," (who *must be the presentee*) "do call and *entreat* you to take the *spiritual* oversight of us in the parish, promising you all *respect and obedience* in the Lord." In witness whereof, we subscribe these presents.

Now the object and meaning of the call according to this settled style cannot be misunderstood. It is an expression of willingness to be under this pastor—an assurance of support—a desire for the spiritual ministrations of the presentee—an adherence to him as their pastor, tending to give him encouragement—to strengthen his hands—to animate him with the assurance of respect, and give solemnity to his labours, by the public declaration of obedience in the Lord. It is an assurance corresponding to his vow of duty : It is an assurance which precedes his taking that vow upon him, and which entitles him to expect good result from that adhesion to him.

It is then, in form, in object, in substance,—an expression of *assent*—of *adherence*. It is, in short, affirmative :—a *call* on the presentee to enter on the office to which he has been nominated.

Is there, then, in the style, in the form, in the expressed or implied object, any provision for *disapproval*—for rejection of the man. The people may join or not as they choose, in the *call*—in that which is a promise of support, and an assurance of obedience to the spiritual pastor. But is there the slightest intimation in this form,—of moderating a call—(such being the call)—that, instead of *inviting*, the people may *disapprove* and *reject*? Where is a trace to be found in the Call of a provision to such an effect? of the possibility of such a result as a part of or within the intendment or object or scope of the call? Regulations or means for giving effect to such a disapproval, (the act admits,) cannot be found, and have never existed. But where is there a trace of the occurrence of such an event as rejection being within the province or scope of a call? The form and its object,—the style, and time, and occasion of it,—all demonstrate that a veto is totally alien to a call.

I call your attention to these observations, as demonstrating that this veto has nothing whatever to do with the scope or meaning of a Call.

But, further, the Call, according to the established form and style, is *addressed to the presentee alone*; it is *not addressed to the Presbytery*. It does not purport to be any part of the nomination, or admission, or induction of ministers. It does not require or call on the Presbytery to do anything. It is a matter between the people and the presentee. So far as it goes, it is good of itself, being the expression of desire, and an assurance of obedience towards the presentee.

But in this case of Auchterarder, one of the first under this interim act of Assembly, the Presbytery totally changed the form and style of the call,—changed its form and style, as in use and observance among themselves,—changed the immemorial and universal style of a call to a *presentee*.

In this case, to give more decent colouring to the working and regulations of the Veto Act,—to suit and bend the established forms (always the important and faithful exponents of principles and of established rights) to the new views and extravagant usurpations of this act of Assembly, they added this entire new clause,—“*We likewise,*” something, observe, in addition to, and ever and above, the Call to the presentee,—“*We likewise entreat the reverend Presbytery of Auchterarder to approve and concur with this our most cordial call, and to use all proper means for making the same effectual, by your ordination and settlement among us, as soon as the steps necessary thereto will admit.*”—In witness whereof, &c.

Here, indeed, is the style which would give the object they desire to a call. This is the style suited to a nomination and selection of a person by the callers themselves,—the title and nomination to the office when given by the call, as in the case of the right of popular election, or of a call at large allowed by the Presbytery when the right has fallen to them *jure devoluto*,—the call being thus addressed to the Presbytery as if it were in this case their warrant for induction—as a preliminary and requisite to their proceeding,—making the call, thus, part of the process of nomination—making it a necessary title, and hence leading more naturally to the conclusion, that, as the man must have a call, so his rejection is the counterpart of a call.

But this is not the style or form of a call to a *presentee*, whose title and nomination is complete,—is derived from another quarter,—is independent of the call. The Call to a *presentee*, on principle, on a plain and universal acknowledgment by the Church at all times of the true principle,—the Call to a *presentee* is not addressed to the Presbytery, and does not call on, or require, or profess to enable, them to do anything; nor does it pretend to be a nomination to the office, or a warrant or preliminary to the settlement by the Presbytery. But when this precious act of Assembly came to be acted upon, the total inapplicability of the call to the pretence on which the veto was grounded, stared every one in the face so

palpably, that this Presbytery resolved to give a better colour to the matter, by taking the style of a call adapted for the case of a popular election, in which the call is, like a presentation, the warrant on which the Presbytery must proceed, and tried to adapt the call to a presentee to the new doctrines of the Church, and to the new power called into exercise on *the occasion*, but not under the spirit or form, of the call.

I thank the defenders for this addition to the form of a call to a presentee. It well illustrates, both the true object and limited character of such a call, as it has been heretofore understood, defined, and acted upon, and shows that the veto had no foundation or warrant in the form or object of *such* a call.

Again,—the Call, by the form in use,—by the form even in this particular case, is not only for heritors, elders, heads of families, but *parishioners*. Now, is dissent open to *all these* parties? No. Parishioners are wholly excluded, unless they are male heads of families in communion with the Church. This is a very curious part of the new measure. Its authors, I suppose, shrunk back from their own principle, as often happens in these expedients for popularity, and were startled at the absurdity of the lengths to which it would carry them. But in stopping short, they have fallen into great inconsistency; for, while they pretend, not that this veto is a part or portion of a call, but, to use their *accurate*, and *precise*, and *well-defined* language, is within *the matter of a call* (observe the terms always used,—*within the matter of a call!*)—Why, they exclude from the veto, it may be, the *majority of the congregation or parishioners*, who are entitled and invited to sign the call, and expressly limit the right of disapproval to a majority of the male heads of families. This is whimsical:—Most strange, when the defence of the veto is, that it somehow grows necessarily out of, and is the converse, and hence (admirable logic!) *because the converse*, therefore the *legal result*, of a Call,—most strange, I say, that this resulting right of rejection should not belong to all invited to sign the call. The Presbytery moderate a call: they thus invite all the parishioners to sign it:—The right to *express assent* gives of legal necessity, says the Church, the right to reject, as a part of the same principle; and yet they begin by defining the right to *reject* as not commensurate or coincident with the right to *call*, of which it is said to be the consequence, but as belonging to a much more limited, and supposed to be (I presume) a more grave, authoritative, and deliberating portion of the callers! What inconsistency!

Hence, in no view of the *matter* of a call which can be taken, looking to the form, the style, the object, or the parties, can it be said that this right of disapproval belongs to, grows out of, is inseparable from, or is any proper result of, a call.

But at *this time*—the act allows “*disapproval*.”—the term is

curious—it is rejection ; rejection without reasons on the part of the Church,—without power to inquire into reasons,—without examination even if it is the result of “ causeless prejudices.” Mr Bell was equally eloquent and pathetic on the great importance of the distinction between reasons, which can be stated, and *equally valid* reasons, which cannot be stated or explained. A wise principle, to be sure, for a *Church* to adopt : wonderfully consistent, too, with the doctrines of presbytery as to the jurisdiction and judgment of the Church courts : But here the Church splits no hairs : Here all ceremony is laid aside : The presentee may be the most learned, pious, and popular minister in the Church—the feeling against him may be known to the whole presbytery, to be the result of most unchristian prejudices, and most malicious combination,—to be the result of the intrigues of others to force in a particular person,—but all this is immaterial : The major part of the male heads of families are not to be controlled—they are to have a power of rejection, absolute in itself, and into their motives or grounds of dislike, the Church is not to presume to inquire.

The Procurator for the Church, with great simplicity, complained that the Act of Assembly had suffered in general repute and estimation by getting the nickname of a Veto Act. “ We term it “ and name it, an Act on *Calls*. Give us that as its true name. It “ was to be in title an act *on calls*—do not nickname it. *We* surely “ are to give the name to our own production, and you ought to allow it to be an act on calls, for such is its title.” Without stopping, my Lords, to consider the force of this very naive argument in support and proof of the *competency* of the *thing done*, I would beg to ask what is this rejection but a veto ? What, in *sense*, in substance, in form, but a VETO ?—a veto on the man nominated by the patron—a veto on the patron’s exercise of his right to present—a veto which the Church declare and enact must receive effect, without reason assigned, insinuated, or called for—a veto which compels the Church to reject the man in respect of the sovereign, arbitrary, and irresponsible will which disapproves. If this power is nicknamed falsely and erroneously a veto, I will take any other name *descriptive of the thing* : But really it is rather idle in grave argument to tell us, when considering *what it is*, which the Church has done, and now defends,—to say, “ call it not a veto. “ Do not so prejudice our act—give us the right to name it as we “ call it an act on calls. You must be content so to view it and “ treat it.”

The presbytery is thus only to take and record the votes. All power, authority, and jurisdiction by them in relation to the person’s fitness, qualifications, or the objections to the man whom the Church has previously licensed, is at once abandoned. The great principle of presbytery, (as hitherto asserted by the Church of Scot-

land,) that every matter whatever must be judged of and determined by the Church courts, and that they cannot surrender or give up the jurisdiction they possess as a Church court in all matters committed to them, is unscrupulously abandoned. Reject the man they must, or rather announce his rejection they are constrained and ordered, whatever be his gifts, his piety, his learning, and his tried usefulness, though known to them by previous labour in another cure. They have no choice;—the stern sentence of rejection, the teachers and instructors and pastors of the people must announce, because it is the will of that people, though condemned by the judgment and opinions of the presbytery, who thus become the instrument and tool for recording a veto, which they themselves, the Church courts, may know to be groundless, unjust, and capricious. What a high and fitting position for the Church courts to assume!

In 1649, an act of Parliament abolished patronage; and allowed a settlement to take place on the *suit* and *calling* of the congregation, and committed to the General Assembly the power and the duty of laying down the rules by which the matter on that principle should proceed. By the Directory 1649, to which I shall presently advert, the Assembly, under this act of Parliament, as a fitting and proper fulfilment of it, ordained that the *selection* should, in the first instance, be made by the *elders*,—that the man so selected should then be offered to the congregation—and that, if, on objections stated by the majority, and inquiry by the presbytery, it should be found that the objections of the majority were “causeless “prejudices,” the presbytery, exercising their high functions as a Church court, entitled and bound to inquire and judge, were, nevertheless, disregarding causeless prejudices, to proceed to settle the man:—This, too, under a system of popular election, when the Parliament had said that the settlement should proceed on the *suit and calling of the congregation*. So little notion had the fathers of the Church of sovereign will—irresponsible and capricious preference or rejection by the people—of the valid reasons which my friend says may exist, though they cannot be stated, and are incommunicable from mind to mind,—that even on this statutory right to the congregation to *call*, the selection was to be made *for* the people *by the elders*, and to the man so offered to them, if the dislike and objection even of the majority was found on inquiry, to be, in the opinion of the presbytery, the result of causeless prejudices, the man was to be settled; the people were to give up their prejudices to the judgment and opinion of the Church court. So essential, so overruling is the power and duty of collation in the Church, that the person proposed by the session, even on this system of popular election, was not to be peremptorily rejected by the people, without *reason*, from prejudice and caprice; but the presbytery were to *judge*, and to settle if the objection of the majority is groundless in

their judgment. Yet, this veto, this right of peremptory rejection by the people, is said to be a fundamental law of the Church of Scotland.

What a contrast between the tone and principles asserted by the Church in 1649 and in 1834. In 1649, Parliament abolishes patronage, and leaves to the wisdom of the Assembly to say how the congregation shall call and elect. The Assembly declare that the causeless prejudices of the people ought to be disregarded. In 1834, when Parliament maintains patronage, the wisdom of the Assembly declares, that even causeless prejudices must be indulged, and must predominate and rule, and abandons to such their own jurisdiction and authority!! Alas, for the character of the Church—for its authority over its people—for its character with posterity, and on the page of history.

4. The act proceeds, "If the major part of the male heads of families shall not disapprove of such persons to be their pastor, the presbytery shall proceed with the settlement." This, then, is a *condition* of the presentation receiving effect, and necessary to the presbytery proceeding. The rejection is a legal bar—it is only if no rejection occurs that the presbytery are to give effect to the presentation.

By the act, the right to reject is given to a *specific* and *limited* portion of the people or congregation. Now this specific right of rejection in this defined portion of the people must be shown to be part of the fundamental law, or it is new, and usurpation. If a right of rejection by any one is within the statute 1592 or 1711, is it credible that no mention of such peremptory right of rejection of a Veto should be contained in these acts at all? But, passing that for the present, observe, that this right is said to be by law in a certain portion of the congregation: This is still more extraordinary, for no one previous regulation of the Church itself alludes to male heads of families, or separates one portion of the congregation from another. The majority of the people—of the parishioners may be for the presentee—nay, the majority of communicants also may be for him, but still the right of rejection is said to be in this specific portion—the majority of male heads of families.

This part of the regulation, then, is of great importance in judging of the legality of the Act of Assembly. My presentee is rejected solely on account of a veto by a majority of male heads of families. The minutes of Presbytery prove this. The record admits it to be the sole ground of rejection. Now, is this the majority of the people or congregation? That is not proved or ascertained. The power is given to a specific portion of the congregation, not to a majority of the whole congregation. The legality of the Act of Assembly depends on this point. What act—I do not here say of Parliament, but what rule or law of the Church warrants this separation of the congregation;—this denial of all right, power, or importance to commu-

nicants if they are not the heads of families, and this vesting of exclusive power in the latter. The *call* or *assent* by a *majority* of communicants goes for nothing under this new system, if a majority of the heads of families,—it may be greatly the minority of the congregation,—dissent. Now, then, where is the law or *dictum* which vests exclusive privileges in this specific portion of the congregation? And by the legality of this must the act be judged of. Is this within the fundamental law as declared—why, that says “*contrary to the will of the people* :” Taking that to mean congregation ;—then if we take the declaration of the fundamental law, will it ever give this most special result of exclusive privilege and power in one specific portion of the congregation? I should think not. The act says, that, in order to carry into *full effect* the fundamental law, that a pastor shall not be intruded on a congregation contrary to the will of the people—they do what? Let the majority decide? No, to give *full effect* to this *principle*—this fundamental law, the privilege shall exclusively belong to one, and only to one, specific portion of the congregation: This is odd. I put the case, that the great majority of the congregation or the communicants have an unconquerable dislike to the presentee—no special ground of objection to him—but an unconquerable dislike—not the less valid and sufficient and good, (on the authority of my learned friend,) because it is wholly unaccountable and unexplainable: Well, then? What is to happen? Surely after this pompous and solemn declaration of the fundamental law, the man is not to be intruded on them against their will,—at least in carrying the principle into full effect, this result will be guarded against? Is it so? No: If the majority of the *male heads of families* do not dissent, the presbytery are to proceed and to settle notwithstanding the will and repugnance of the great majority of the people. What, then, becomes of this fundamental law, or rather of the authority of the declaration which announces it? Why, that, by their own confession and enactment, there is no such law, and the declaration is only the pretence, to be sure an ill-considered and ill-worded pretence, for the change which its authors intended deliberately to introduce without regard to law, principle, or practice.

These, your Lordships will admit to me, are not mere criticisms on the capacity to legislate shown in this Act of Assembly. I try their alleged principle by their own enactment ;—I try the legality of the power they give to a portion of the congregation by the alleged law to which they appeal.

Either there is such a fundamental law which they are entitled to insist that the civil court shall respect, or not. If there is, then where do they find this most singular practical *limitation* of it? Not in the terms in which they announce the law certainly, for the only intelligible meaning of these terms is to lead to an opposite

and much broader practical result, and to that result as a matter of positive and inalienable right on their own showing. But if the law *gives no right* in the opinion of the church itself, if they may explain and interpret and limit and bend the principle they announce in any way they choose, and give or withhold the right it implies to or from such portions of the congregation as they think fit, leading to results also diametrically in opposition to the law they profess to declare, the conclusion is irresistible that the whole measure is new and arbitrary legislation.

The Act of Assembly says, "If the major part, &c. shall not dissent, the presbytery shall proceed to settle." Now is this—this absence of dissent, made a condition on the right of patronage in any Act of Parliament which confirms the right of patrons? It is now a condition by this veto Act:—nay it is made a *condition precedent* of the presbytery exercising the functions implied in the act of receiving and examining ministers. Was it or was it not for the statutes establishing the Church and securing patronage to attach that condition?

Now, then, let me ask you farther to follow me, through the *regulations* enacted, in order to *carry the principle into effect*.

The first remarkable thing is in the first regulation: They say when a presbytery shall have *so far sustained* a presentation, &c. This is a great change. The form and style of the first deliverance invariably has been "*to sustain* the presentation." Observe the importance of the change. If it is meant by this change that the presbytery do not receive and sustain the presentation, then something is made a condition precedent of civil right. Mr Bell admitted that they had received and sustained the presentation—nay that they were bound to receive and sustain—and so had acknowledged the civil right to the full extent. It is necessary to understand this matter distinctly. The terms and effect of the deliverance of the presbytery in the old form—"sustaining the presentation" vests important right and status in the presentee. (1.) It excluded the *jus devolutum* claimed by the presbytery in the Kiltarlity case, on ground of an objection to the patron or his commissioner. (2.) In *Gillon v. Duke of Gordon*, 1. W. and S. Appeal Cases, it was held that a presentee after the presentation was sustained, and before induction, was the proper party to be called in a valuation, in *respect of the deliverance sustaining* the presentation, which necessarily vested the right to the cure in him, provided only he was found fit and qualified. Mr Bell was fully aware of the duty and obligation on presbyteries to sustain the presentation, and to give full effect to their own deliverance in sustaining it. If they do not, the wrong done is within the power of this Court, on his own admission.

But if they do *sustain*, then your Lordships will see that a control or veto is wholly impossible consistently with that deliverance,

for a veto relates to the *title*; it rejects the presentation not on a matter for the church to decide, but by reason of the control of the people over the patron's choice. How, then, is it to be taken? "*So far* sustain a presentation as to be prepared to appoint a day "for moderating a call." This is a very curious phrase—at variance with all church practice and forms; and the change is not accidental. It is most important in reference to the *sentence* to be pronounced or issued on the veto.

It seems to be well understood that this direction or *hint*, *only partially* to sustain the presentation, was essentially necessary, as the ground-work of any rejection subsequently which did not arise from a *judgment* of the Presbytery on the *trial* and *examination* of the presentee, for I observe that this Presbytery, (as you will find in the minutes, p. 2. of the appendix to pursuer's case,) only "*in so far* sustain," the presentation as to appoint a day for moderating the call. Hence the change is deliberate—is important and practical.

The reason for the change is plain. If the presentation is sustained, then the *nomination* would be acknowledged to be complete, and the Presbytery *must proceed to receive and admit* the presentee, if found qualified, that is, they must proceed to ascertain if he is qualified, as the only other condition to his induction into the office to which his title and his nomination are complete. To reject him afterwards, without taking him on trials on the ground of a control over the nomination, or a veto by a third body, would be quite inconsistent and irreconcilable with *sustaining* the presentation. Hence the change. They alter the established forms, (here also the true exponents of powers and rights and duties,) in order to reserve an opening for a rejection based solely on, and the consequence of, the control on the nomination, which the Act of Assembly gives against the patron to another body.

Now, Mr Bell admitted that the Church was bound to *sustain* the presentation, if no question arises as to the party who is the patron: Nay, not adverting to this point, he took credit for the fact, that the Presbytery *had* in *this* instance *sustained* the presentation, and had thus satisfied and acknowledged (as he termed it) the civil right of patronage to the full extent. What this means I do not know, if they give another party the power to reject the nomination. But the fact is not as he supposed; and it is clear that, if the presentation had been *sustained*, the nomination would then have stood completed and acknowledged, and, consistently with that acknowledgment, there could be no rejection by a third party.

Here, then, is wrong: But what is more—the established forms of the church procedure plainly and satisfactorily demonstrate, 1. That there never had been a *provision* for, or a trace of, this control on the patron's nomination; and 2. That, consistently

with a *fair, full, and unreserved* acknowledgment of the nomination and selection by the patron as a title to the office, there can be no subsequent rejection or veto by another party. Consider, I entreat you, the terms of the established form of deliverance—" *sustaining* the presentation" in connection with the terms of the deed of presentation, as settled and uniformly in force from the Reformation downwards. Mr Whigham read them. I need not do so again. The deed of presentation is *directed* to the Presbytery: It nominates Mr Young to be minister of the parish and church. It *requires the Presbytery to take him on trial*, and having found him fit and qualified for the function of the ministry, to receive and admit him accordingly, and give him his act of ordination, &c. This is the form of *that deed*—the nomination. The settled form of the Church procedure was a deliverance to *sustain* that presentation. The Court must see how the two cohere and connect together—that the latter has been the result of the operation of the undoubted law as to the patron's right, and of the obligation on the Presbytery (to take the presentee on trials and to admit if qualified,) declared in the act 1592, and expressed and repeated in the deed of presentation, according to the settled form. If, then, they *sustain* that presentation, they must and ought, by force of that acknowledgment, and on the requisition of the regular deed so expressed, to take the presentee on trial, and to receive or reject him *according to the trial*: But, to avoid that result, a new course is adopted. The presentation is not sustained—it is only sustained to a certain effect, viz. of moderating a call; and the presbytery and the Church insidiously, and in this underhand way, try to save their right to reject without a trial, and to give an opening for a control on the nomination quite inconsistent with the acknowledgment of the title or nomination to the office, and of the duty it requires the presbytery to perform.

This is a point of principle in the very outset, and a vital point. The Church and the presbytery in this instance, on the admission, I think, of Mr Bell himself, have not acknowledged the patron's selection. They have not satisfied, as he called it, the civil right. They have not sustained the presentation. If they had, neither in law nor in principle—neither in metaphysics nor morals—neither in form nor substance—would it be possible to reconcile this acknowledgment of the patron's sole right to nominate with a control or veto on the nomination after such an acknowledgment by the Church.

Here, then, is palpable wrong. Here, on the face of the act, is interference with civil right, and interference essential for the introduction of the veto which the Church intended to confer against patrons.

Allow me now to proceed with these regulations. The first,

in a subsequent part of it, says "the presbytery, shall proceed to moderate a call *in the usual way*,"—a clear admission that the call is quite distinct from this veto, and, as understood and acted upon, involved no veto.

The *second* says, that, on the day of moderation, the presbytery "shall, in the *first* instance, proceed in the *same manner in which they are in use at present to proceed*." And on looking over the regulations you will see they *first exhaust the call* and *special objections* stated for the cognizance and judgment of the presbytery as "*this usual manner*," before they come to the new and totally distinct measure—the right to dissent or to veto.

Clumsy, indeed, the whole affair is—but *valuably* ill-worded, clumsy and blundered, for the purposes of this argument. Here in regulation second you have the distinct admission and provision that the presbytery shall, in the first instance, proceed as they *are in use* to do at present;—and yet we are to be told that, after this usual procedure is closed followed out and exhausted, that what is superadded is *within the matter of the call*, and is not a distinct and separate thing from the call, to which *it is added* by new and separate regulations—regulations, too, which mark the distinction, and describe the dissents and veto as a matter which is to go on independently of what is done in the call, or of the result of the call.

Then, if your Lordships will glance your eyes over the regulations which immediately follow, you will see that they relate to the ordinary and established practice of receiving *special* objections against the presentee, which are to be judged of and decided by the presbytery as part of their province and duty of collation, in the course of the *trial* of the party presented. And directions are given for going on with the investigation of such special charges in the same manner as at present, according to the forms suited to the importance and graveness of the charges.

In regulation sixth it is prescribed, that, if the special objections are not well founded after considering the presentee's defence, the presbytery shall proceed to the settlement of the presentee according to the rules of the Church. Then it is added—"But if the presbytery shall be "satisfied that the objector or objectors have established "that the presentee is not *fitted usefully and sufficiently* to discharge "the pastoral duties in that parish, then they *shall find* that he "is not *qualified*, and shall intimate the same to the patron, that "he may forthwith present another person; it being always in "the power of the different parties to appeal from the sentence "pronounced by the presbytery, if they shall see cause." Now, observe the terms of the sentence, which, in conformity with established practice, it is here prescribed that the presbytery in the event supposed are to pronounce. They are to find that the pre-

sentee is *not qualified*, and *therefore* to call upon the patron, (if the time is not expired,) to present another person: Now this is according to law and principle, and to the duties and powers of the Church courts, as pointed out by the terms of the statutes 1592 and 1711. Your Lordships will contrast the terms of this sentence with that which is to issue, if by a veto the presentee is rejected without trial of his qualifications.

Then at the seventh regulation commences a series of new provisions, not only utterly unknown in practice, but of any system corresponding to which no trace is to be found in any Church record or history, for receiving dissents without cause assigned by the male heads of families,—in other words, for receiving the *votes* of the male heads of families, that they may have the opportunity of a *veto* on the patron's choice,—for that is the object and substance of the thing done. I need not allude to the *mode* of receiving such dissents, for the form is utterly immaterial. The thing allowed and introduced is, that the people may reject the presentee by a veto on the patron's choice without cause assigned, and without the right or power on the part of the presbytery even to consider whether this is mere caprice, or causeless and unchristian prejudice; in short, the power given to the people is absolute—absolute against both the presbytery and the patron, and it is perfectly clear that it is therefore a direct veto. And much as my learned friend objects to the term “veto,” it is this power of peremptory rejection or veto on the patron's choice, which for three days he has been anxiously contending for. But even if it were possible to disguise the matter by any regulation as to the mode in which the veto is to be exercised, the fourteenth regulation would utterly exclude all doubt upon the point. It is in these terms, “That if the presby-
 “ tery shall find that there is at last a major part of the persons on
 “ the roll dissenting, *they shall reject the person presented*, so far
 “ as regards the *particular presentation*, and the *occasion of that*
 “ *vacancy* in the parish; and shall forthwith direct notice of this
 “ their determination to be given to the patron, the presentee, and
 “ the elders of the parish.”

Here the matter is not disguised. The duty of the presbytery is merely to ascertain the majority. Jurisdiction they have none. The Sheriff might have performed equally that part of the matter. The Church declares that if a majority dissent, the presbytery shall, without choice or option, reject the person presented. From that sentence there can be no appeal, for it is the inevitable result of the ascertained majority, however protracted and tedious the discussions which will arise and have arisen, as to the votes of the parties.

Thus, then, the Church surrenders wholly its jurisdiction to take cognizance of the fitness of the person presented. However qualified in the opinion of the presbytery and the church at large—however unexceptionable the presentee—however causeless, unchristian, and

objectionable in their origin and motive the prejudice against him—though the fruit of cabals and intrigues to secure another and a less fit man,—the patron has no redress against the rejection. The presentee of his choice, though qualified, must be rejected in respect of this veto. The *will* of the *people* supersedes the opinion or judgment of the presbytery. *It is the ultima ratio Ecclesie !!* It is therefore a *veto* on the patron's choice, and it is equally ludicrous and unbecoming on the part of the church to represent such a matter as any part of an ecclesiastical trial, when such is its undoubted and undisputed operation.

But it is most essential here to remark the peculiar terms of the sentence or deliverance to be pronounced in such a case by the presbytery. The presentee is not found *disqualified*,—such could not be the terms of the deliverance of the presbytery, for objection to the presentee had not been stated, and the grounds of dislike to him were utterly unknown. It would have been a prostitution of the character of the Church courts, and a falsehood which they could not affirm, to find a man *not qualified*, whom they were precluded from taking on trial.—And so, my Lords, you have the extraordinary deliverance prescribed to them by this regulation, and in the terms of which the sentence in this particular case, (see page 9 of the Minutes,) is exactly worded, *rejecting the presentee so far as regards the particular presentation and the occasion of this vacancy*. The presentee's license as a preacher remains. His qualifications are not touched, impaired, or impeached,—*qualified* he is to receive a presentation in terms of the statutes 1592 and 1711. He may be inducted into any other parish,—nay, into this, on another vacancy, if the whims of the people take another direction. I put, then, to the Court the point, which, in the case of Auchtermuchty, it was found you had the power to cognosce and determine; has “legal objection” been stated to this presentee? That cannot be affirmed. The deliverance rejecting him in the terms prescribed by this fourteenth regulation precludes such a supposition. He is not found, or stated, to be not qualified. Opinion of the presbytery on the presentee there has been none. The Church allows another body to reject the party without trial, and the power and duty of judgment in the matter of qualification they have surrendered.

And let me just in passing give an illustration of the effect of this extraordinary measure on the rights of patrons and on the authority of the Church courts in a case which has already occurred. A most respectable nobleman, lately deceased, appointed to a vacant parish an individual known to him (only by character) as a most efficient, eloquent, useful, and popular clergyman in the parish in which he had been long placed. What better security could he have that he was appointing a *qualified* presentee, than in taking a placed minister of established reputation and tried efficiency, and unquestionable po-

pularity? But he was not the man whom the people of the vacant parish wished, and he was vetoed by a bare majority of one, and of that majority one was an individual stone deaf—of course the presbytery had no choice. The presentee was rejected by a deliverance in terms of this regulation, and yet he remains the clergyman of the parish in which he was originally placed, of the highest reputation, but the rejected presentee of the other, and with that stigma upon him. And, this, forsooth is said to be consistent with the free exercise of the patron's right to appoint *any qualified* presentee, and to be reconcilable with the statutory obligation on the presbytery to receive and admit *whatever qualified* presentee they find on examination to be qualified.

My Lords, I have not cited this case for the purpose of dwelling on the indecency of such an exhibition, as a part of the Ecclesiastical procedure of the Church of Scotland, in the view which the Assembly has now taken of the nature of the duty and power of collation and examination of ministers which they received from the State. I give it as a proof that a deliverance rejecting a presentee in terms of this 14th regulation, in respect of a veto, is utterly irreconcilable with the statutory declaration, that the Presbytery shall admit and receive *whatsoever qualified* presentee the patron presents; that such rejection leaves the *qualifications* of the presentee unimpaired and unimpeached;—And that though it may form part of any new system, which Parliament may introduce, subjecting the patron's choice to the control of the people, yet this measure now gives to them at present, and by the act of the Church, that control, without the smallest reference to the *qualifications* and *fitness* of the presentee, or of the power and duty of collation vested in the Church, which is not permitted to judge of the presentee's qualities.

But now we come to that part of the enactment and regulations, for the purpose of introducing which I have carried your Lordships at so much length, but with a degree of attention for which I am very grateful, through the details of this measure.

We have now got the length in these enactments of the rejection of the presentee, and then the question necessarily forced itself upon the mind of the authors of this measure, How is this system to work?—The patron must present a *qualified* presentee within six months, by statute, else the right of presentation passes over to the presbytery, *pro hac vice, jure devoluto*?—*Quid juris*, then, if the six months have elapsed at the time of such rejection by reason of the veto, or if the patron will not present another? What is to be the effect practicably to the patron, and to the parish of such rejection? Every body knows that in practice the six months frequently expire before the various proceedings contained in these regulations can be terminated. Several months may elapse before the patron can select a person qualified, in his opinion, for the pa-

rish. The patron may be abroad. Then a considerable time may be consumed in the proceedings as to the true majority. In some cases which have already happened the appeal and discussions as to the votes of persons upon the roll, and the regularity of the manner of making up the roll, have occupied more than a year. In short, the six months may easily elapse before the party is rejected, and the patron has the full period of six months allowed to him for selecting a qualified presentee. Well, then,—what is to happen? How is the system to work?—was one of the vital points which the proposal of this measure necessarily suggested. The patron might abide by his presentee;—then has he presented a *qualified* person or not? If he has, then he cannot lose his right of presentation, *pro hac vice*? But is he to go on for ever (supposing the first presentee withdraws) presenting after the six months man after man, whom the people are entitled to reject, and each rejection insuring the next, unless they are allowed their own choice and selection. On the *principle* of the veto act, such a result would be manifestly absurd. The parish might remain for ever vacant. If the first presentee did not withdraw, no other could be presented by the patron, or successive presentees might be rejected in endless succession—keeping the parish destitute of ministerial labours during such a process. That result palpably could not be reconciled with any view of the working of the measure for the good of the Church, and so the Assembly proceeded to solve the difficulty in a manner peculiarly and exquisitely novel, but which at once raises, as the inevitable result of the main principle of this measure, a proper question of civil right. The statute law says, that if a *qualified* person is not presented within six months, the right of presentation goes to the Presbytery, *jure devoluto*. Then by reason of the rejection of the man, on the ground of the people's veto, have the Presbytery acquired the *jus devolutum* or not? It is plain, that for the success of this new measure—for the working of the principle, and for any consistent defence of the people's right of rejection, it was some how or other necessary to accomplish this consequence, viz. that the patron was to forfeit his turn, and that the rejection after the six months should work a forfeiture *pro hac vice* of the patron's right. But how was this done? To pronounce the rejected presentee *not qualified* when the Presbytery had been precluded by the veto from judging of his qualifications, and were not entitled to ask even the ground of rejection, would have been too extravagant. Again, the sentence rejecting him, specially leaves his qualifications untouched. To any other parish the same patron may present him—to the same parish on another vacancy. How, then, is the right of presentation, *pro hac vice*, to be transferred to the presbytery,—as by the law of the land the "*jus devolutum*" is declared to be a forfeiture or penalty in respect of a quali-

fied person not being presented. The Church drop all ceremony, and leap over all legal obstacles, and proceed at once to usurp and transfer to themselves the right of presentation. The two next regulations are, "15. That, if the patron shall give a presentation to another person *within the time limited by law*, the proceedings shall again proceed in the same manner as above laid down, and so on in regard to successive presentations *within the time*."

"16. That, if no presentation shall be given within the limited time to a person from *whose settlement a majority on the roll do not dissent*, the presbytery shall then present *jure devoluto*."

These regulations deal with the point quite consistently with the views of the Church. But then is this sweeping enactment within the power of the Church? Here is at once a question of civil right raised by the principle and on the face of this Act of Assembly,—raised necessarily, for collision with the patron by the assertion and claim of the *jus devolutum* is unavoidable. Now, my Lords, at any period has the church ever claimed the right to decide when the right of patronage has fallen to them *jure devoluto*, or has the court ever so viewed this point? As to the competency of the Church deciding this point, the case is the same, whether the claim arises in an individual case, or from a general rule of the Church, declaring that in certain events they have the right. How has this point always been viewed by the Legislature—in the practice of the Church—and in the civil courts?

I am most anxious to call your special attention to this point. In the view I take, it is the *turning* point in the cause. Is it or is it not within the power of the Church to pass a declaratory law establishing conditions which will deprive patrons of their right in a great class of cases, and then by a sweeping enactment to declare that the right has in such cases passed to themselves *jure devoluto*. If not, this Veto Act cannot possibly stand, for this consequence is quite essential to the system. The system is absurd without it. So the Church knew and felt. If the Church has no such power, then the whole question is at once made the subject of the jurisdiction of the civil court. Again, if the Church has no power to give itself the *jus devolutum*, then the Court must have the jurisdiction we insist for,—*in order to exclude that usurpation*. On that supposition, it is plain that,—1. You must have jurisdiction to decide upon the grounds on which the Presbytery claim the *jus devolutum*. 2. You must have the means and the authority required to *prevent* this usurpation of power, if not legally devolving on the Church. 3. You must have means to disregard and deny effect to any act done in virtue of such usurpation. This is a very short view of the questions of legality and of jurisdiction, but an important^d and conclusive view.

The act necessarily raises it, and if—1. The Church cannot give itself the *jus devolutum*,—if that is a civil question;—and

2. If the Court is to decide that question,—is it not clear that the competency of the Act of Assembly is at once proved on the face of it, to be within the jurisdiction of the Court? Then 3. If within the jurisdiction of the Court, you must have all the powers necessary for your jurisdiction, and over a body subject to your decisions on this point,—which point involves the whole question of the legality of the Veto Act,—of the effect of a rejection on that ground,—of its effect on the rights both of patron and presentee,—for if good, it leads at once to the question as to the *jus devolutum*, and that question the Church takes on itself the power at once to decide.

I wish to put this view prominently and anxiously before the Court. I hold it to be conclusive in showing that this enactment of the General Assembly, both in its leading principle, and on the face of its regulations, subjects itself necessarily to the jurisdiction of this Court. I say *subjects itself*,—for whether other measures might be introduced by the Church indirectly operating disadvantageously to patrons, but which, as the result of a judicial opinion in the individual case upon the presentee's qualifications in the course of the exercise by the Presbytery of its power of collation, the civil court might not to be entitled to take cognizance of, yet the case here is different. The Church does not sit in judgment on the presentee. There is no deliverance finding him not qualified; they are prevented from judging of his qualities. Their rejection is in substance ministerial,—the result of a veto by another body; and so long as the Church adheres to this measure, (if it shall now be found to be legal,) they can give neither the patron nor presentee redress. But how is the Church to answer the presentation which they have received? They have *not found* the man *not to be qualified*. But the statute declares that the *jus devolutum* passes to the Presbytery, *only if a qualified* person shall *not* be presented within the six months. They have no claim except in that case, and by virtue of statute. Well, then,—the law leaves to *them* to say if the person is *qualified*, provided they exercise their functions, and proceed to the trial of the presentee. But if they do not exercise these functions,—if they abandon the duty of collation, and allow another body to reject the presentee, and abstain themselves from pronouncing an opinion on his qualifications and fitness,—how can they get the right of presentation *pro hac vice*? Can they produce a sentence finding him *not qualified*, and claim it under the statute as the *forfeiture* (for this turn) of the patron's right to present, in respect of that judgment on his qualifications by themselves,—the competent tribunal? To that issue the Church could not bring it, for the very object of the measure, namely, of giving a right of rejection to a portion of the congregation, excluded the possibility of the Church pro-

nouncing any sentence at all on the qualifications of the presentee. And cutting the knot at once, they simply declare—as if they were armed with the power and omnipotence of Parliament, that they are entitled by legislation to interfere with civil rights;—nay, to transfer such civil rights to themselves. They proceed by a sweeping enactment to declare, as in the sixteenth regulation, that, if no presentation shall be given within a limited period to a person not vetoed by a majority, the Presbytery shall then present *jure devoluto*.

Does not this enactment then or claim necessarily subject the measure to the cognizance of this Court; for it raises (as indeed the measure without any such enactment would have raised)—raises inevitably—a competition for the right of presentation—I say a *competition* for the right of presentation. It raises the question, in the *first* place, has the patron forfeited, *pro hac vice*, the right, when the presentee has not been proved not to be qualified? Is the Church entitled, in the *second* place, to claim it? On what ground, in the *third* place, can they claim it? Not because the presentee is not qualified, but because the Church have declared that, which statute only can declare, that the rejection by reason of the veto shall forfeit the patron's right, and transfer it to the Church.

The moment the question is brought to this issue, I say the jurisdiction of this Court is beyond all doubt established.

Now the civil question thus raised cannot be avoided. Take the Act of the Assembly alone without its accompanying regulation,—how is the “principle” to work? What was to be the effect of rejection on the patron's right for that vacancy? What was the claim of the Church, in respect of such rejection, against the patron if the time had expired? These points would have been forced upon the Court by the declaration merely of the general principle. But the Act of Assembly by its regulations raises these questions,—raises that which all admit to be a question of civil right,—the competition between the patron and the presbytery for the right of presentation. But still more, and over and above all this, the measure contains the enactment, that in such cases the presbytery *shall* present. It *authorizes* the inferior church courts to go on to present, settle, and induct in such cases. It gives the sanction of the church to,—nay it professes to effect,—the transference of the civil right in the cases supposed. By doing so, an appeal against the settlement and induction by the patron to the superior church courts would be unavailing, for the enactment gives the presbytery the right to present, and the superior church court could not stop or undo the settlement. Hence the mischief would be incalculable and irrevocable.

Thus, then, the measure is a direct interference with and usurpation of civil right, and the nature of the question so raised—the

character and extent of the interference—plainly brings within the jurisdiction of the civil court the legality of the measure which creates that interference, and of necessity gives rise to the jurisdiction, and to the remedies, by which interference of such a character and usurpation and assumption of right so complete, (if illegal,) may be prevented.

Had the question of the *jus devolutum* not been raised by the principle and machinery of this measure, a much more general question would alone have occurred for the determination of the Court. With that question I will also grapple. But this is a view independently of all general argument, and quite apart from, and independent of, all the discussion in which the Court hitherto has been engaged. When examined in detail, this measure by the Church comes to an assumption of the right of patronage *jure devoluto*—inevitably, plainly, to that assumption. The patron who presents, abides by his presentee, though rejected by the veto. He says, "Take my man and try him—pronounce him not qualified if you can—I run my risk—I say he is qualified. The statute gives me the right to present *any qualified* person. Who says he is not qualified?—the Church does not. Judgment to that effect there is none, and what do you, the Church, tell me in reply to my presentation of this qualified man? Simply that the people won't have him. You mean to exercise my right of patronage, because that veto is to operate a forfeiture of my right." And the Church does adhere to their claim to the right of presentation on this ground. This, then, is the result of the measure—the issue which it involves and to which it comes—an issue of civil right, and an issue of civil right depending upon the competency of this act of Assembly, and to decide which issue *cum effectu* the Court must have its ordinary jurisdiction to prevent wrong, as in all other instances of a competition between the patron and the presbytery for the right of presentation —*pro illa vice*.

I have said that this view of the case is *conclusive*:—For no one has ever disputed, at any period, that the Church could not give to itself the right of presentation *jure devoluto*, or decide the circumstances which give rise to such devolution. Whether it be the lapse of time, as to which there have been some nice questions,—or whether it be, the point much agitated at one time, if the six months run from the date when the death of the incumbent comes to the knowledge of the patron, or from the date of the death;—or whether it be, that the presentation must not only be issued, but presented to the Presbytery within the six months;—or whether it be, that the presentation of a qualified person interrupts the currency of the six months, and so excludes the devolution, although the presentee withdraws his acceptance;—or whether it be, that the patron or presentee has not complied with the *statutory* preliminaries, to make the one qualified to present, and the other quali-

fied to hold the presentation ;—in short, whatever the point involved in the competition,—on whatever ground the Presbytery claim the right as devolved *pro hac vice* to them, the determination of such competition, with the whole jurisdiction and remedies necessary for explicating the matter, has been uniformly, by the admission of all lawyers, and the constant acknowledgment of the Church, deemed to be the subject for the decision of the Civil Court. I need not refer to authority upon the point, for it is not, I understand from my friend, disputed. But I will take the liberty of requesting the attention of your Lordships to some decisions which illustrate most forcibly the uniform acknowledgment by the Church, that in all cases, a claim by Presbyteries to the right of presentation was a civil question exclusively for the Civil Court, and the strength and universality of the conviction which has produced that practical and uninterrupted acknowledgment. I refer you, *1st*, to Presbytery of Falkirk *v.* Earl of Callander, December 8, 1696 ; Fol. Dict. 247 ; Fountainhall, i. 740 ; Morison's Dict. 9961. *2d.* The Procurator of the Church and the Presbytery of Ayr *v.* Earl of Dundonald, March 2, 1762 ; Fac. Coll. and Mor. 9961. This case, as many others were, was tried by order of the General Assembly, and it involved a point unquestionably in part ecclesiastical, arising in the course of the trial and admission of a presentee, namely,—his right to accept another church *salvo jure* of the patron, and to withdraw the acceptance given in to the Presbytery. *3d.* The Presbytery of Paisley *v.* Erskine, August 10, 1770 ; Fac. Coll. and Mor. 9966. *4th.* Presbytery of Strathbogie *v.* Sir W. Forbes, August 2, 1776 ; Fac. Coll. and Mor. 9972 ; and Appendix, Patronage, No. 2. There have been other cases in which the General Assembly directed the Presbytery claiming the right of presentation by devolution *pro hac vice*, to try the point in the civil court, no matter from what cause soever the patron's forfeiture was said to have arisen, and the devolution to have taken place. But I need not multiply examples upon a point undisputed and indisputable.

To two things I may, however, in passing call your attention as deserving of attention. 1. There is not a single case, I believe, in the records of the Church, in which the Assembly have allowed the claim by the presbytery to be acted on before the decision of the civil court, since the case of Auchtermuchty in 1735, and no prior case. 2. There is not one case in which the Court have listened to any pretension of the Church, to decide practically, or even in any indirect manner, on its own claim to the *jus devolutum*, or to affect the patron's right,—by any act of the presbytery—by any regulation or by any ecclesiastical procedure, tending to exclude that right, and to secure it to themselves. The measure before you is legislation to the effect of giving, if not with the view to give, to the Church the civil right.

Whenever the Presbytery has ventured to act, (1.) The Court have inquired into the ground of objection to the *presentee* of the patron, and of the alleged forfeiture. (2.) If the ground has not been sufficient in the opinion of the Court, they have given redress—redress varying according to the length to which the presbytery have gone. The act of ordination, if once passed, to be sure, the civil Court cannot *undo*. But to that even they *deny effect*, in considering if the patron's right was forfeited, or his presentee rejected without trial.

Thus, then, I submit this Veto Act *raises* questions for the civil court, which *involve* necessarily the *legality* of the measure, and which give to the Court the jurisdiction necessary for deciding *cum effectu* these questions.

I know, my Lords, that an attempt may be made to defend the claim by the Church, to decide in their own favour, this point as to the devolution of the right of presentation to the presbyteries, in the cases specified,—by the Plea, that the presentee in such cases will be rejected in respect of the want of *concurrence* in the *Call*, and of the consequent insufficiency of the *Call*; and hence, that the rejection is on a ground, which establishes unfitness in the presentee, if he cannot obtain such *concurrence*. I pass over at present the obvious but conclusive observation, that, notwithstanding the rejection, the presentee might have a *Call* signed by an infinitely larger proportion, both of heads of families and parishioners, than ever was deemed by any portion of the Church at all necessary for a sufficient invitation and call to warrant the party to undertake the office of pastor over the flock,—an infinitely greater number—nay by a majority of the congregation and of communicants. But I do not dwell on that:—For I reply to any attempt to state *such* a defence,—that it is *only stating the very same thing in different words*, and putting the matter in a different form. No matter on *what ground* the Church says it will decide the devolution of the right of patronage:—equally it is an interference with, and an assumption of, civil right,—a determination of the competing claims of patron and presbytery, and an attempt to declare a forfeiture, in the case in question, of the patron's right, which is to transfer it to the presbytery.

And surely, my Lords, if a question of civil right is so decided by this measure, if it does attempt to usurp and exercise the power of deciding the *jus devolutum* as against the patron, how can the *competency* of such an attempt vary with the ground on which the Church is pleased to say that the forfeiture has in their opinion occurred, and the right passed over to themselves. Or on what intelligible principle can the jurisdiction of this Court to decide that civil question be excluded by the Church announcing to us, that because they proceed on such or such grounds, therefore the determination of the civil question must belong wholly to them, and

be excluded from the cognizance of the supreme Civil Court, to which, *ex concessis* of this plea, the question would *otherwise* entirely belong.

Here let me point out to your Lordships the direct application and great importance of one branch of the Auchtermuchty case, which I must afterwards, on another part of my argument, very fully explain. The very plea to which I have now adverted was raised and maintained by the presbytery in that case, in support of their claim to the exercise of the right of presenting *jure devoluto*. The case is Moncrieff v. Maxton, February 15, 1735. Morison, 9909.—Folio Dict. ii. 47, and Elchies *voce* Patronage, No. 1. The patron presented. The people disliked the presentee, and wished another man, which is generally the cause of such dislike. Few, if any, signed the call,—the parish generally opposed him, and in *respect* of this *general opposition*, the presbytery *rejected the presentee*, without taking him on trials at all, on the ground that such opposition was sufficient ground of rejection; and then the presbytery claimed the right *jure devoluto*. I know perfectly, my Lords, (as Mr Bell now hints to me) that the six months had not expired when they moderated a call to another—that is quite true. But if their ground of rejection of the presentee was good and valid, the patron had lost his right *pro hac vice*, for he did not present another, but abided by this first presentation: And so, if the ground of rejection was good in law, the right had devolved to the presbytery, and it was *jus tertii* to the patron,—(and formed no point in the discussion,) that their right, which, *ex hypothesi*, had so opened to them, was exercised too soon. The patron had forfeited. The point was, whether the ground of rejection by the general opposition of the parish, and the insufficiency of the call, was a *legal* and valid ground,—one which the Church could legally adopt, and effectually enforce and maintain, so as to open to themselves the right of patronage, if within the time another was not presented. The ground taken by the presbytery and their nominee was, that, “if the presentee was not “acceptable to the parish, he was not fit for the ministry in that “parish, and that the opinion of the parish was a trying of his “qualification,”—that the presbytery was, therefore, entitled to reject him on this ground, without any trial by themselves, and so, that, on the lapse of six months, the patron had lost his turn.

In one of the elaborate papers in this Auchtermuchty case, this argument is thus put on the part of the presbytery by their nominee, Mr Maxton, in the competition which arose for the stipend,—the patron not having come to the civil court until after the presbytery had actually inducted and ordained their nominee into the cure.

“Here, lest the patrons should have fancied, that by that act, “and the act *decimo Annæ*, the Church was obliged to receive

“ any presentee, declares and enacts, that the Church is absolute
 “ final judge of the qualifications of the presentee ; and it is a
 “ gross mistake, that many seem fond of running into, that no-
 “ thing but error or vice disqualifies a presentee. A presentee’s
 “ gifts not being edifying to a parish, or even less edifying than
 “ another, will make the Church lay aside the presentee ; and they
 “ consult the end of their institution when they do so, and they
 “ transgress no law of the land ; yea even ministers admitted, they
 “ transport sometimes against their will to churches where they
 “ can be more useful, and will refuse to transport them when they
 “ reckon them more useful where they are : So they are by law,
 “ even since the restoration of patronages, declared sole judges of
 “ the qualifications of the presentee, and they were, and are law-
 “ givers what these qualities must be : And as their Supreme
 “ Court of judicature is their legislative Court too, they can and
 “ do dispense with their own rules when they judge it tends to
 “ *maius bonum ecclesiæ*.

“ A person for want of the *Irish* tongue would, if presented to
 “ a Highland parish, be rejected. A person for not being
 “ thoroughly versed in the Popish controversies, would be unfit
 “ for a parish where there are many Papists and priests going
 “ about. Preachers with weak voices, are unfit for some wide
 “ churches, and with weak constitutions, are unfit for wide pa-
 “ rishes. Ministers who have been very useful in the parishes
 “ and corners where they have been settled, the Church very just-
 “ ly refuses to transport them to other parishes, where they have
 “ not the prospect of their being so useful, though ministers should
 “ accept of presentations to these other parishes. If the Church
 “ is stript of this discretionary power in their administration, they
 “ and the people are in a sad case.

“ And ’tis an ancient rule in their Books of Discipline, and
 “ a very reasonable one, *that no minister should be intruded upon*
 “ *a congregation against its will* ; for that is reckoned an evi-
 “ dence his gifts are not edifying to it : And that is still a rule,
 “ and there is no law condemns it ; on the contrary, this disci-
 “ pline of the Church is ratified by the Union, and *in terminis* de-
 “ clared in the foresaid act 1719, as to this article of it, the judging
 “ of the qualifications of the presentee ; and in the present case,
 “ *the congregation, at the moderation of a call, were against the*
 “ *presentee, and therefore he was not accepted of.* The modera-
 “ *tion of a call is a trying the presentee, if his gifts be edifying*
 “ *to the congregation, which they by their votes declare.* It is
 “ *a trial of his qualities with respect to his fitness or unfitness*
 “ *for that charge.*

“ Upon receiving the report of the moderation in a call, the
 “ Presbytery, on the 17th of July 1733, found there was a very
 “ harmonious call to your memorialist, viz. from the whole elders,

“ a great plurality of heritors, the whole Town-Council of *Auch-*
 “ *termuchty*, with the approbation of all the congregation; and
 “ therefore *sustained* the call to your memorialist. They *neglect-*
 “ *ed the call to the presentee, because few voted for him, which*
 “ *is in effect, finding the presentee unqualified for that parish.*
 “ The Synod of Fife affirmed the sentence of the Presbytery; ;
 “ the Commission reversed this sentence of the synod, and the
 “ last General Assembly reversed the sentence of the Commis-
 “ sion; that is, *they rejected the presentee as unqualified for this*
 “ *parish, upon the evidence of the parish, its thinking him so, by*
 “ *their voting for another at the moderation.* That this was the
 “ reason of the Presbytery, the Synod and the Assembly’s setting
 “ aside the presentee is evident from the foresaid minute of Pres-
 “ bytery, from the answers to the reasons of appeal against the
 “ Synod’s sentence, and from the complaint upon the Commission
 “ to the Assembly. ’Tis true, there was objection to the patron’s
 “ right too; *but still the grand reason for setting the presentee aside,*
 “ *was the declared mind of the parish against him at the modera-*
 “ *tion.*” On advising this argument for Mr Maxton, in defence of the
 supposed rights of the Church, and of the proceedings of its judi-
 catories, in rejecting Mr Moncrieff’s presentee, the Court pro-
 nounced an Interlocutor, of date Feb. 15, 1735, finding, “ That
 “ Presbyteries refusing a presentation duly tendered to them in
 “ favour of a qualified minister, *against* which presentation or
 “ *presentee there lies no legal objection*; and upon admitting an-
 “ other person to be minister, the patron has right to retain the
 “ stipend, as in the case of a vacancy; And, therefore, finds the
 “ reasons of suspension relevant.” Observe, *as in the case of a va-*
 “ *cancy—not because there was a vacancy, but as in a vacancy—to*
 “ the same effect, and for the same purpose. But the Court did not
 hold that the parish was vacant:—and of course did not hold that
 it was filled by the presbytery: on the contrary, they clearly held
 that the presentation had filled the office.

Your Lordships will perceive and acknowledge the importance
 of this decision on the plea which I have quoted, to the particular
 argument I am now pursuing. I am contending that this Veto act is
 within your cognizance and jurisdiction, and necessarily raises
 civil questions; for it claims and disposes of the right of presen-
 tation *jure devoluto*. The reply which may be attempted is, that
 the ground of rejection—the opposition of the people—is within
 the province of the Church—is ecclesiastical—is part of the call—
 is equivalent to a trial of the qualities of the presentee, and so that
 the Presbytery may reject in respect of the opposition of the people.
 Now, this was the very ground taken a century ago in the only case
 which the Presbytery claimed the presentation, *jure devoluto*, in
 respect of a rejection on such a ground; and you thus see the de-

cision of the Court, which, holding that no *legal objection lay to the presentee*, and that the ground of rejection was illegal, denied effect to the title of the nominee settled and ordained by the Church, and withheld from him the fruits of the benefice.

It is hardly necessary to observe, that the principle is the same, and the result must be the same,—whether the presbytery claim the right of presentation, by rejecting in an *individual* case on the ground of such opposition by the parish, or whether the Church declares, that in all cases of such opposition the presentee shall be rejected, and the *jus devolutum* go to the presbytery. In either case the wrong is the same,—the pretext for the wrong is the same,—and the usurpation of the patron's right is equally illegal, for it proceeds on the same ground in either case.

But, in truth, this act goes much farther than a judgment in a particular case, holding the opposition to be a sufficient ground in that case, *in the opinion* of the presbytery, for rejection; for there, at least, there *is a judgment* which may be appealed to the superior Ecclesiastical Courts. But the Veto Act lays down a general rule, that, if the people reject, the presentee is to be rejected exactly as if *not qualified*, although there is no judgment to that effect, and that the patron, if there is *yet time*, must present another; and if there is not time, or if he will not present another, that by reason of presenting a person who has been rejected, he has lost his right *pro hac vice*, exactly as if the person had not been qualified.

What, then, is the *effect* of the Church establishing such a condition on the patron's right by its own authority? It is plainly a bounty on rejection, and invites the people to do that which is to give the power to the Church, and to carry the patronage, *jure devoluto*, to themselves!! And yet we are told that this does not raise any civil question, and that the Court cannot take cognizance of the matter at all,—to try the legality of what is so attempted, or to give redress,—but must quietly submit to this usurpation, *because* done by an ecclesiastical body.

The Church itself makes the condition on the exercise of the right of patronage, which is to carry the patronage *jure devoluto* to the presbyteries; and then claims exemption from all control or jurisdiction of the civil court. There have been many usurpations of power by the Church of Rome, but none more flagrant or monstrous, I grieve to think, than this pretension of the Presbyterian Church of Scotland.

I come now to the seventeenth regulation, “That cases of presentation by the presbytery, *jure devoluto*, shall not fall under the operation of the regulations in this and the relative Act of Assembly, but shall be proceeded in according to the general laws of the Church applicable to such cases. But every person who shall have been previously rejected shall be considered as

“disqualified to be presented to that parish on the occasion of that vacancy.”

Surely this extraordinary declaration shows at once the *spirit* and the *illegality* of this enactment. We are solemnly told, that it is a fundamental law of this church, that no pastor shall be intruded on any congregation contrary to the will of the people:—Then,—on the principle of the inherent right thus proclaimed and acknowledged by the Church itself, How is the *will* of the *people* met or satisfied or answered by the mere *will* of the *presbytery*? Only in the spirit and on the principle of the Church of Rome—on the notion of the infallibility of the Church. If, in the case of the *patron's* presentee, the judgment of the presbytery holding the man to be perfectly qualified, is not to be opposed to the will of the people—if, as to the *patron's* presentee, their opposition and dislike implies a fundamental power of rejection, with which the Church court is not entitled to interfere,—it is indeed most singular to make the *will* of the *presbytery* predominant in favour of their *own* selection, and to hold that to *their* case, the fundamental law as to the will of the people being supreme, is not applicable. Why is it not applicable? If reasons are not to be assigned in support of the dislike of the *patron's* presentee—if their rejection is in *that* case to be sufficient, *because* no pastor is to be placed over any congregation contrary to *their will*, and therefore *their will* is to be paramount—what sort of answer is it to say in the *other* case, that the person is selected by the presbytery? Plainly it is no answer, except upon the doctrine of infallibility. And the origin of this exemption of the presbyteries from the veto is to be found only in the *spirit* of POWER—that spirit of power which, wherever ecclesiastical bodies are left without control, will be found, from the infirmity of human nature, to be the characteristic of every church. The presbytery, forsooth, cannot err in their choice. They are the fittest judges, who is qualified to be the pastor of the congregation. They can have no spirit of jobbing,—no son or cousin, or adherent of one of themselves to serve; or even then, their choice is the result of unerring discrimination, and unalloyed purity of motive. To allow the people to have a will against them—to reject their presentee, is to set up the will of the people against their teachers, to whose judgment opinion and views for their interests, the people are bound to bend, and who must be incomparably better fitted to decide whose ministrations will be edifying to the people than the people themselves:—All very good. But what has this to do with the supremacy of the will of the people, announced as the fundamental law. The patron concurs in holding the presbytery to be much fitter judges of the matter than the people. He presents a man who he desires to have tried by the presbytery—he desires to abide by the judgment of the presbytery, confident of the result, and willingly sub-

scribes to the doctrine, that, if no intelligible objection can be stated against his presentee, the presbytery's judgment is of greater authority than the caprice of the people. But the answer to him is, "the *will* of the people is not to be opposed; no pastor "is to be placed contrary to *their will*. We may not ask their reasons. It is enough that the man does not please them. They are "to be pleased. They are to be satisfied. Hence we cannot ask "why they object—for they have a right to object—*because* it is "their will." Then is it not lamentable to see the Church of Scotland, hurried on by the spirit of power, rushing into so gross an inconsistency, as to proclaim that, as soon as *they* get hold of the right of presentation, their selection must overrule all causeless prejudice,—that the will of the people must instantly bend to their choice;—and that the man of their nomination, if no *special* objection can be *proved* against him, must be placed, whatever be the repugnance or dislike of the people.

In the case of a presentation by the presbytery it is said that the matter shall be proceeded in "according to the *general laws of the church*." What an admission here of the extent and illegality of the *change*! When the Church comes to exempt their own presentations from the operation of this new measure, what terms do they employ,—to what laws and rules do they appeal, in order to *secure* the exemption, and *exclude this veto*? Why they refer to the *general laws of the Church* as *sufficient* to exclude this veto!—To those general laws, in which, with singular inconsistency, they tell us they yet find an inherent right of peremptory rejection on the part of the congregation. Can any confession be more complete, or can stronger proof be given that this measure is *change*,—change alike in principle and practice, without precedent in the records of the Church.

And, combine with this admission—the declaration at the close of this interim act:

"The General Assembly further declare, that cases in which "the vacancies have taken place before the rising of the present "Assembly, shall *not fall under the operation* of the regulations "in this and the relative acts of Assembly, but *shall be proceeded "in according to the general laws of the Church*."

Surely this declaration is an acknowledgment, that, in the laws and practice of the Church, not the least trace was to be found of any right or means of rejection by the people, or of any analogous or equivalent control over the patron's choice. This declaration is another admission of change: In order to exempt the cases referred to from being affected by the measure, it declares that they shall be proceeded in according to the *general laws of the Church*: Then how can the Church be listened to when it tells us that one of the fundamental laws, which they are only now giving better form and scope to, implied and acknowledged the will of the people, as an *effectual control* on the patron's nomination?

It is not, your Lordships will do me the justice to believe, for the sake of cavilling at the *terms* of these regulations, that I have made these remarks. They appear to me, I trust also to the Court, to point out inconsistencies on the face of this enactment irreconcilable in point of principle, and demonstrating that the measure, be it within the power of the Church or not, is at least by their own admissions an entire *innovation*.

You must permit me to advert to the twenty-second regulation, which, if not as directly applicable to the argument on the point of legality, is at least not unimportant as to the rights of the patrons, and the legitimate rights and interests of licentiates of the Church, who have received presentations, and indicates the apprehensions of the Church itself for the manner in which such might be affected. It is as follows :

“ 22. That the presbyteries of the Church shall use their utmost endeavours to bring about harmony and unanimity in the congregations, and be at pains to avoid every thing which may excite or encourage *unreasonable* exceptions in the people against a *worthy* person that may be *proposed* to be their minister.”

“ Unreasonable exceptions against a worthy person !”—What poor compensation this to the patron or presentee ! But what is its meaning ? Is the Church entitled to call any disapproval unreasonable, when the Church declares, in the *first* place, that they will not, and may not, investigate or judge of the ground of dislike, and when it proclaims as a fundamental principle of the Church, and an inherent right of the people, that the latter are not bound to state their reasons for rejecting a presentee, and that, if not agreeable to them, he is not fit to be their pastor ? Let me notice also the extraordinary phrase at the conclusion of this regulation : “ Exceptions in the people against a worthy person that may be *proposed* to be their minister :”—What, then, is it come to this ? Is a presentation merely a *proposal* of a man to the people ? Is this the nature and footing and extent of the patron's right ? Or is the Church obliged to go this length in order to find an opening for the introduction of the people's right of control, and to reconcile the veto with the patron's right ? They must indeed assume the latter to be of no higher character, and to deserve no greater effect than a mere *proposition* tabled for adoption or rejection to the people, as the supreme and ultimate and irresponsible patrons !

Now then, generally, on the scheme of a veto, I put to your Lordships,—What is there spiritual or ecclesiastical in the matter ? Indefensible, it is admitted to be, *unless* ecclesiastical or spiritual : As a new measure—as legislation, it is defended only upon the ground of being spiritual, and so within the power of the Church to legislate in matters spiritual. Let us try, then, its pretensions to this character. The patron's right to *select* is civil. That is ad-

mitted. But the people's right peremptorily to *reject* is, forsooth, spiritual. Why,—what a flimsy veil for the usurpation. Is it not just a corresponding right of rejection in the one party to the right of nomination in the other. The one nominates—the other has a right to dissent or reject ;—Aye, to dissent before the presbytery take the man on trials, without assigning a cause—simply as a power of control vested in them. How, then, is the one right a spiritual or ecclesiastical matter more than the other? Was it then an exercise of *spiritual* authority on the part of Parliament at the time of the Reformation to guard and confirm the rights of patrons? That the Church cannot tell us, for the right of patronage does not emanate from them, and consequently is not secured by their authority. Then how is it to be an exercise of *spiritual* authority to create a *check* and *control* on the right of patrons, to giving another party the power to reject the presentee? If the nature of the act does not imply spiritual authority, (and clear it is that such a veto might have been established by the *State*, if thought to be expedient or consistent with the prior rights of patrons,) of course the mere fact that it is bestowed by the Church, will not of itself, make the matter spiritual or ecclesiastical.

Now I desire to ask what is there spiritual or ecclesiastical in the people receiving or exercising a veto? In the elaborate argument of my friend, Mr Bell, I did not hear a word addressed to this point. Nor can I understand how an arbitrary and peremptory right of rejection is to be invested with the character or the sanctity of any thing ecclesiastical. If, indeed, objections to the presentee,—to his life, doctrine, piety, or talents and attainments, are stated to the presbytery for their judgment, on which he is to be tried (independently of the ordinary examination,) then to be sure there arises an *ecclesiastical cause*, on which the presbytery are to judge, and the matters so raised are within the province and jurisdiction of the Church courts. But if no reasons are to be stated or assigned—if there is to be no inquiry before the presbytery upon any objection whatever, and no opinion or judgment by them either as to the doctrines, attainments, piety, or gifts, of the presentee—if, when the man is “proposed” to them the people simply reject—how is it possible to represent such right of rejection as partaking, in the most remote degree, of the character of a spiritual or ecclesiastical proceeding? Why, precisely as the patron is in the first instance entitled to *select*, the people are entitled to *reject*. The one is a civil right as much as the other. The patron *selects* a person whom he thinks qualified. The people *reject* the man, because they do not think him a fit person—because they won't have him. What is to make this rejection, then, an ecclesiastical matter? Is it the *nature* of their objection? Why, that is not to be inquired into or judged of. Is it the *motive* in which their opposition originates that gives a *spiritual* character to the act? How can that be predicated of the motives of

men ;—Or how can a general presumption in favour of piety and sanctity of motives be asserted by the Church, which has to preach the corruption of human nature, and the imperfections which mingle even with the act of worship ?

But if there is nothing whatever spiritual or ecclesiastical in the act of rejecting a presentee, then *the conferring* the right so to reject is not the exercise of ecclesiastical or spiritual authority, but is simply the grant of a civil right.

Again, upon this measure of the Assembly, and in reference to the line of argument I am now pursuing, I particularly beg the attention of the Court to the fact, that against the deliverance of the presbytery recording the veto, and the rejection of the presentee in respect of the veto, there can be no redress by an *appeal* to the superior ecclesiastical courts. Upon the point, whether or not there was a majority—whether the roll of communicants was regularly made up—there may be litigation interminable before the ecclesiastical courts. But the majority being ascertained, that is, the veto of the proper number recorded, the rejection of the presentee is declared to be the *necessary* result, and from the deliverance of the presbytery there can be no appeal. Here, then, was another great and mighty change introduced by this measure, and a change which satisfactorily demonstrates that the scheme establishes something essentially different from a Call.

Mr Bell fully admitted, that whatever discussions took place for a short period during the last century, as to the necessity or propriety of the expression of a *concurrence* in the settlement by some portion of the parishioners, yet that, for the last eighty years, the matter had practicably been settled, (so settled, indeed, that Sir Henry Moncreiff solemnly recommended that the question should not be again agitated,) that a presentee could not be rejected by the Church on account of the alleged insufficiency of the invitation given to him at the Call. But then what I wish the Court to observe is this—that when objection was made in the early part of the last century, to a settlement proceeding on a patron's presentation in respect of the alleged insufficiency of the Call, it was only made a question for the *presbytery* to *decide*, (and then for the superior Church Courts to review the decision,) whether the concurrence and assent at the time of the Call satisfied what was said to be the object of the Call. In every case *it was a question* for the *Church Courts*. The presbytery *judged* of it. They disregarded the objection or not, according to their opinion of the individual and the circumstances of the case. Rejection (Peremptory Rejection without cause assigned for the presbytery to judge of) by the people was never contended for or heard of. The state of the discussion was uniformly, What was the *presbytery* to do ?—Were *they* satisfied the man should be settled ? Was the want of concurrence so great as in *their* judgment to form an objection ? And fur-

ther, if, as often happened, the local Presbytery went wrong, the patron had the power of carrying the matter to the superior Church Courts ;—First to the Synod, and then to the General Assembly, in which the great intermixture of laymen generally corrected the zeal which overleaped legal objections, and almost in every instance secured redress.

But here the right of appeal is cut off. That great characteristic of Presbytery is abandoned. The veto of the people imposes on the presbytery a sentence of rejection, against which, by an appeal to the superior ecclesiastical courts, redress cannot under this enactment be obtained. Now this never was the case as to any question whatever which ever was stated or agitated as to a Call. And here, then, is both a most sweeping change and a distinction most vital in principle between this new measure and a Call.

I submit, then, that the view which I have now given satisfactorily makes out the two propositions which in the outset I took the liberty of announcing : 1. That this enactment *involves* and *disposes* of *civil* questions, which necessarily put in issue the legality of the measure, and call in the jurisdiction of the civil court : 2. That this Veto, or right of rejection, is totally distinct and separate from a Call, whether you look to the mode and time and form of exercising it—its object or its effect.

In the preceding argument, I have endeavoured to avoid any discussion or introduction of the more general parts of the case, and have wished to confine myself to the views suggested by the Act of Assembly itself, and by the admissions already made by my learned friend the Procurator.

But I turn with even more confidence to the more general argument, as to the legality of this enactment, and the jurisdiction of this Court to give redress to the effect sought for in the present action.

In entering on this part of the case, the Court will allow me to assure them, that I hope not to digress into any political or historical discussion of a general character, which does not directly bear on the conclusions in this Summons.

Let me ask you, then, to consider on what conditions, and on what footing, was the Presbyterian Church established in Scotland, as the National Church ?

One great principle on this subject seems to me, my Lords, to be clear, viz. that, except in so far as authority, whether legislative or judicial,—whether in ecclesiastical or civil matters,—is *committed* by the state to a National Church, it can have no *inherent* power, which courts of law can recognize, to affect any civil right or interest whatever. And of all established churches in

Christendom, the Church of Scotland has the least pretence for claiming any such authority.

In 1560, the existing religious establishment was abolished, and all the authority it possessed abrogated and repealed by statute. From antiquity, then, the Presbyterian Church of Scotland has no authority whatever which it can appeal to, in support of the power of legislation now claimed by her. At the Reformation the change was total, complete. The religious opinions and general feeling which produced this change *tended towards*—but not more at first than tended towards—a particular form of ecclesiastical polity.—The Reformation in Scotland, however, was not brought about by changing the creed of the existing church, and carrying on a different persuasion under the old institutions; The latter *fell*. The authority of the existing Church was completely annulled; and for some time no establishment whatever existed in its room. It was not by pouring fresher blood into the ossified and corrupted veins of the ancient system that our Reformation was accomplished. A new and vigorous—a young and untried fabric, full of energy and power, was created by the state, in the room of that which the state overturned and abolished. I say *created*—for it was devised, formed, moulded, instituted, and created wholly, and of new, by the State. It was after various struggles and conflicts—after long and fierce discussions—after the lapse of thirty years—that a system was at length matured and adopted by the state—it may be grudgingly and reluctantly adopted by a corrupt court, and by an insincere false and unprincipled monarch; but still until adopted, there existed only the authority of pious and eloquent and able men, invested with the sacred office of the ministry, but without an establishment, or regular endowments or judicial authority. At last the state did resolve on sanctioning and adopting a certain ecclesiastical system as the national establishment.

Shall I not, then, have the assent of your Lordships to the proposition, as alike well founded in point of historical truth and constitutional principle,—that in all such questions as those which are now agitated, the consideration which must determine all such controversies is—What *did the State adopt and establish*—what did it bestow and sanction and authorize? Mr Bell used, apparently by accident, one very important and significant expression, when asserting the *authority* in a court of law, of the Second Book of Discipline. He asked, “Who was *authorized to give up* the “claims of the Church?” Against the pretensions contained in that question, I do firmly protest, as utterly unconstitutional and wholly unfounded in historical fact. The question is not—on the establishment of a national church by the Legislature,—what the *Church gave up*—but what the *State chose to adopt and did adopt*. I pray you to consider what is the real meaning of this question, which in truth lies at the foundation of the present case;—Why, it is

this,—that the Church claims, as of divine right, a power to legislate, regulate, and control, whatever it pleases to assert lies within its province, or falls within the principles it may originally have held, whether these principles were adopted or rejected at the time of its establishment.

There is no pretension more alarming than that involved in the question which accidentally escaped from Mr Bell; and I rejoiced that it escaped from him. “Who was authorized to *give up* the *claims* of the Church?” Why, what claims or right had any religious persuasion against the State before its establishment. The only objection that can be taken to the admirable, well arranged, and well reasoned argument of my friend Mr Whigham, was, that he gave too favourable a view of the matter for the defenders, when he described the establishment of the national Church as a *compact*:—For any such compact implies the existence of *two* independent bodies, with previous independent authority and rights. But what rights had the Church of Scotland before its establishment by Act of Parliament to assert or surrender or concede:—a Church not formed, not instituted, not created,—changing in its polity and ecclesiastical views, from year to year, from the Reformation until 1578 at least;—satisfied with bishops and superintendents in 1572, with the assent of Knox at the close of his life—and only starting into the sterner and bolder form of Presbytery through the fiercer zeal of Andrew Melville, and the more uncompromising views he imported from Geneva? But, above all—once instituted and adopted by statute, are we now to be told that *beyond* that which Parliament sanctioned, there are reserved, or can be reassumed, powers and claims by the Church, and that having got its powers its endowments and its influence from the State, the establishment can turn round on the State itself in such a question, in order to claim authority, against the civil power, for the parts of the Second Book of Discipline, which had been expressly rejected by the State,—on the ground, forsooth, that the claims of the Church could not be abandoned or conceded even in the treaty or compact—if so it is to be viewed,—to which alone it owes its existence as a national Church.

The question I advert to involves the claim of Divine Right—of a power to legislate and regulate as bestowed on the Church by its great spiritual Head, and inalienable as in a pre-eminent manner derived from the authority, and accompanied by the blessing, of God. This, my Lords, is the most pernicious error by which the blessed truths of Christianity can be perverted, and its influence on the Social System blighted and destroyed—an error which arms fallible man with the belief, that he possesses the power and authority of the Divine Teacher whom he worships, and leads him to disregard all rights, or usages, or laws which interfere with the *end* which he is thus taught to believe he has a divine com-

mission to accomplish, or with the *authority* which he believes he is commissioned to enforce.

But, with a view to the plain truths which I must plead and establish against the Church of Scotland, in face of the country, I desire not to be misunderstood. My client has a deep interest that I should not be misunderstood,—I personally have an equal interest. My client has an interest that the arguments used for him should not be misunderstood, threatened as he has been in the General Assembly with the deprivation of his license, for contumacy in presuming to try this question. I have an interest that I should not be misunderstood,—bound and devoted to the Church of Scotland by choice, with an attachment hereditary in all the descendants of that Great Lawyer,* who was found the only Advocate ready and willing in 1606 to defend its ministers against the intolerant and tyrannical persecutions of the perfidious Monarch, whose conduct towards them was characterized equally by falsehood and oppression. I say, my Lords, let not the institution of the Office of the Holy Ministry be confounded with the purposes and rights of an Established Church. My client believes,—I believe,—in the divine institution and the divine commission of the office of the holy ministry, and that the blessing and power of God does accompany, and will accompany, the labours of the ministry, for the accomplishment of all the great and sacred purposes for which the gospel of truth was proclaimed. But do not let us, I say, confound the divine institution of the office of the holy ministry with the character and powers of an establishment. The institution and authority of the office of the ministry are not confined surely to the clergy of the persuasion which the State has adopted, nor is the blessing and power and grace of the Spirit vouchsafed only to *their* labours,—at least not according to all I have learned of the doctrines and principles of the Presbyterian Church of Scotland. The commission and the blessing are given to all who are ordained to preach the message of salvation through the atonement of the *Divine* Saviour of men.

These are views, however, of a character widely different from the pretensions of an establishment to power and authority, and belong to matters of far higher concern than the status and power, legislative or judicial, of any national church.

When one has to consider the powers and authority of a national church established by statute, the true question, and the simple question is, to what extent has *statute* entrusted to that church any authority or power, either in spiritual or ecclesiastical matters? The question is not one of divine right or spiritual authority or Scriptural truth. It is a question of *law*, of dry law, depending on the construction of statutes, and the force of precedents. Every religious association must as such have spiritual authority, it is true,

* Sir Thomas Hope.

over its members; *e. g.* ordination to the office of the ministry can come only from the religious body. It alone can depose;—it alone can *truly* judge of the fitness of a man for the office of the ministry. But it does not follow that the State *must* entrust the power of examination and admission of ministers to the Church, however imperfect might be any other arrangement. From the Church alone, (the proper order of teachers,) can instruction be given with efficacy and power. All that is true. But when a particular religious persuasion or association is to be made a National Church, it depends wholly on the will of the State what authority it shall possess on any matter whatever, (be it civil, or be it ecclesiastical,—be it doctrinal or spiritual,) on which the State chooses to give directions, or for which to make provision.

An unknown, an undefined, power of legislation or regulation, claimed on the score simply that it is a Christian Church, is utterly at variance with any correct notion of an establishment. The state may *leave* power to any extent to the Church;—but it must be *given*. In so far as not given, or not necessarily resulting from what is given, I say no power to legislate exists as to *any* matter, *which has been the subject of statutory provision*. As a legal, as an historical and political proposition, I would say, no power whatever to legislate or to introduce change on *any* subject,—but I limit myself to the point necessary for this case, and contend that no power to legislate as to any point or interest *provided for or regulated by statute*, is *inherent* in a national establishment.

Again, another great and general principle, I apprehend, must be conceded, as part of the foundation of every Established Church, viz. that a claim for the independence of church tribunals,—bishops or presbyteries,—of the civil power, to the extent of doing any wrong whatever in the eye of law, is a pretension utterly irreconcilable with the fact, that the Church is established by the civil authority, whose tribunals the civil courts are. The claim broadly announced by Mr Bell is as extravagant and dangerous as any claim ever made by the Clergy of the Church of Rome. It is, in truth, the very same claim, and for the very same object—*power*. For example, you have been told that the presbyteries cannot be *directed to do the duty which law might impose*—that you cannot find that they are bound to take a presentee on trials, or direct them to proceed to execute their functions and duty, however clearly *statute* may impose the duty:—Such is the proposition—without disguise,—and why?—because they are independent spiritual tribunals, and therefore you cannot *compel* them to do what statute prescribes, for as Church tribunals they are exempted from, and independent of, the jurisdiction and power of the civil court:—That, even if the law is clear, you cannot prevent the wrong they announce, nor redress it.

Let us understand, my Lords, the length to which this claim for the independence of the church tribunals in consistency goes, on the argument of the defenders of this measure. I put the case, that the Church should adopt the views, (broached, I see, in this presbytery,) that patronage is an unchristian thing, and should direct and ordain the presbyteries not to settle any man who receives a presentation,—or that an individual presbytery should choose to act on that notion,—should disregard such an unhallowed nomination as that of a layman's to the office of minister of a parish, and should proceed to settle a man more fitly called: In short, that the Church or its presbyteries should run directly counter to the law of the land as to patronage. What, then? The wrong is not disputed. The illegality is not disputed. Mr Bell broadly says—Be it that you shall hold this veto act to be illegal,—to be a matter beyond the power of the Church to introduce:—Be it that the statutes imposed in clear terms the obligation on presbyteries, (at the time of the institution of the national Church) to take on trials, and to receive and admit, whatever *qualified* presentee the patron presents: Yet there is no redress, if wrong is done: You cannot enforce the statutes—You cannot direct the presbytery to perform the duty imposed; *because* the Church tribunals are independent of the civil courts, and cannot be *ordained* by them to perform even the duties which statutes impose. This is plainly at once the claim of the Church of Rome.

But let us not forget common sense on such a subject as this. “Independence of Church Tribunals!” What made them independent? Did the statute-law which established them make them so? If so,—then they are exempt from the jurisdiction of the civil courts, *only* because *statute* declared them independent, and to *that* extent, and no further. If not—then they are in no other condition (except as to matters expressly and exclusively and irresponsibly *committed* to them,) than any other tribunal whatever in the state. Hence as to ecclesiastical tribunals, their independence exactly depends on the legality of their acts, and on the extent of authority which the state chooses to entrust to them. The case of the defenders on this point—the independence of Church tribunals—must go the length I have stated, viz. that, assuming that a presbytery were at once to reject a presentation, as an unholy and unchristian thing, and were to attempt to settle a man of their own, this Court could neither declare the right of the presentee, nor interdict and prevent their proceedings, *because* they are exempt from the authority of the civil courts. In fact, the moment the independence of Church tribunals of the civil court, (now openly promulgated,) is asserted, there is no end to the extravagance of the claims which it will sanction, or of the consequences to which it will lead. Just let me remark in passing, that there is one plain but capital blunder in all *honest* defence of such

claims of independence for Church tribunals. The claim confounds the abstract notion of a spiritual tribunal with the *men* who compose it. The *latter* may always *err*, and the *latter* may be always *controlled*. The men who compose the Church court can be compelled to do the duty which law imposes exactly like all other subjects.

I need hardly advert to the absurdity of comparing the relative situation of church tribunals and the civil court, to co-ordinate tribunals of secular jurisdiction, as the Procurator did when he put the case of a collision between the Court of Session and the High Court of Justiciary. The latter are both tribunals of the Civil authority, instituted by the Legislature, in order to enforce in two departments an authority derived from the State itself. But, on the views of the defenders, the Church claims authority independent of what is expressly given, and a right to do wrong *against statute and against the State*. The independence is claimed, I say, *against the State*, and in order to exclude the power of the civil tribunals to prevent the wrong, which the church tribunal may commit. If two courts of co-ordinate secular jurisdiction differ and come into collision, there may be error, there may be confusion: But no authority is claimed *against the State*, or against the civil power. If the church courts claim exemption, *the claim is against the civil power*.

My Lords,—Two matters are chiefly to be looked to at the establishment of a National Church; 1. The *doctrines* to be adopted; 2. The *polity* of Church government to be introduced and sanctioned. The Church of Scotland as to both points is singularly regulated and settled and defined by the Statutes, which established it.

1st, As to its *doctrines*:—Its Confessions of Faith, its creed, have twice been embodied at length into Acts of Parliament—in 1567 and in 1690. These contain the *doctrines* so far as the State and Legislature chose to adopt them. I would wish your Lordships, in reference to this point, to look to the Confession, 1567, chap. 4; with the declaration in c. 6; that those professing such doctrines form the true Church. These two acts shew clearly the accuracy of the principles I have been explaining, and the foundation and origin of the Church of Scotland. See also the description of the Kirk in chap. 7. Again look to the Confession of Faith in 1690, appended to chap. 5 of the statutes of that year. You will find the general authority of Church Courts there treated of in chap. 31, § 3 and 5, but in terms giving no countenance to the principles now broached.

2d, The *polity* of the Church has been definitely and anxiously fixed by statute. On this point my argument shall be limited entirely to that part of the polity of the Church of Scotland which relates to the appointment to the pastoral office; and to the power

of legislation which is claimed by the Church for the control and regulation of that matter.

To the Reformers, the mode of appointment to the pastoral office was a most important point in their plans and struggles. Many patronages were in the hands of bishops, of Popish patrons, or of an ill-affected court; and the progress of the reformed faith and the purity of the gospel seemed deeply involved in this question. They took, however, a very general ground in their contests with the State, and adopted principles which were pregnant with false notions. They held that the *calling* or *selection* or *nomination* of the persons to be ordained, was a spiritual or ecclesiastical matter, as much as the *admission* and *ordination* of the person selected, to the office of the ministry. They did not *confound election* and *ordination*. On the contrary, the two things were carefully distinguished. But they claimed the *election* for the Church as a *spiritual* or ecclesiastical matter. The principles which they contended for will presently be seen, when I advert to the Second Book of Discipline, and to the pretensions therein propounded to the State. Such a claim, as that I now advert to, was irreconcilable with the preservation of the rights of patrons. It was obviously an error in the *extreme*, caused by their apprehensions for the purity of the Church, and by their zeal to secure the progress of the reformed faith, to which so many of the patrons were either hostile or indifferent. If the Church educates and tries the persons who are to be named, and receives the full power of examination and admission, there is nothing surely of a spiritual nature in the act of *selecting* the individual who is to be ordained to any charge,—since the selection is subject to the examination and approval of the Church Courts. So it was, however, that, from whatever motives the Legislature would never concede this point to the Reformers. Indeed, at first, even the trial and examination of ministers was not committed to, though claimed by, the Church; but was expressly reserved for commissioners to be appointed by the Crown.

With a view to precision in a discussion so general, and in order to point out the bearing of all the details I must enter into in the course of the argument I am now to submit, I will take the liberty, at the risk of giving my argument a very formal and somewhat pedantic air, to state to your Lordships the Propositions which a review of the statutes and of the authorities will, I think, satisfactorily establish. I mean, then, to maintain and hope to establish,

I. That the full and free exercise of the right of *nomination* to the *office* of a minister of a parish is reserved and secured by statutes to patrons, as a *condition* on the *establishment* of the National Church of Scotland. I say of *nomination*, not to the *benefice* merely, but to the *office* of minister—of *nomination*, however only.

And, accordingly, in illustration of this principle, when by statute, the *Church* can nominate, or call to the office, it is by the exercise *pro hac vice* of the right of *presentation* in the patron transferred by a statutory devolution to them, and by a deed of presentation flowing from that right of patronage, as much as when it is exercised by the lay patron.

II. That the Church has no power to limit or control the free nomination to the office.

III. That the power of Collation—of examining and admitting ministers—vested in the Church as a national establishment, is statutory in its origin, and defined and limited by statute ;—and that but for statute the *presentation* would have filled the office,—the act of ordination alone remaining to the Church, but without a power of rejecting an unqualified person. I do not say that such a result would have been agreeable to the principles of our Church, and therefore it was not permitted. But still it is the State which gives the power of collation as a check upon the exercise of the right to *present* to the office, and as the only check consistent with a fair and free exercise of the right of patronage.

IV. That the refusal of the Church or of the Church courts to take a presentee on trials, and to exercise the duty and power of collation, is both against the statutory provisions as to the rights of patrons, and utterly inconsistent with the ecclesiastical polity which the statutes established for the government of the Church :—That the power and duty of the Church to judge of the qualities of presentees, and to decide on objections stated or entertained to them, is one leading and main principle of Presbytery—and that such duty cannot be abandoned consistently with statute law. Further—I should contend—if necessary for my argument in a court of law, that as a religious body, the Church courts—acting in the name of the great Head of the Church—cannot renounce, or delegate or give up to its Hearers,—to the people—the duty which, as a religious body, it has by its divine commission, in regard to the members of its persuasion. But with that additional part of the proposition, I need not meddle.

V. That any claim on the part of the Church to make regulations or to legislate on any matter, civil or ecclesiastical, which has been the subject of statutory enactment or provision, is utterly inadmissible in point of law, so far as such acts of the Church interfere with and affect the provisions of statutes.

VI. That whether the power of rejection given to the people by the Veto Act is civil or ecclesiastical, the matter is wholly beyond the power of the Church. I shall submit that the right of *nomination* to the office is with the patron, subject to no approval or disapproval of the people—but solely to the power of Collation in the Church to try the qualities of the person nominated.

In the views I shall submit in support of these propositions, it is

of little consequence what assertions or claims the Church may from time to time, in periods of excitement, have put forth, or what peculiar views or objects the Church may wish to give to the *Call*—I say such claims are of little importance :—For if *statutes* clearly exclude a rejection by the people, it is of no avail to plead claims or pretensions or rules of the Church never sanctioned by the State,—inconsistent with the statutes establishing the Church, and only put forward occasionally, and at long intervals, in general and doubtful form by the Church.

But I shall submit,

VII. That there is no principle or law or practice of the Church of Scotland which sanctions any view of the *Call* giving the slightest countenance to the veto ; or which affords any precedent or authority or warrant whatever for the measure of which we complain.

Perhaps your Lordships will allow me to postpone the discussion of these points until to-morrow.

THE LORD PRESIDENT.—You could not finish to-day ?

THE DEAN OF FACULTY.—No, my Lord.

Wednesday, December 6th 1837.

THE DEAN OF FACULTY.—My Lords,—One of the earliest overtures or proposals in any regular shape by the reformed ministers to the Government, respecting their views for a System of Ecclesiastical Polity in Scotland, contained, as might be expected, propositions respecting the right of patronage,—in other words, respecting the mode of appointing or nominating to the office of the ministry in parishes. The consideration that there was no body of persons trained and educated for the ministry, none licensed by the clergy for that purpose ; that the confession or standards of the reformed faith were not yet fixed ; that the Reformation had many obstacles yet to contend with and to conquer, gave the highest importance to the settlement of that practical question, whether any general system of Church polity or government was adopted or not. The details of the discussions between the ministers and the government, conducted at times in a very formal and diplomatic manner by protocols and answers, your Lordships will find in the histories of the time. I do not mean to go over them. At this time, the *First Book of Discipline* (in 1560) had been drawn up. Mr Bell admits that he can claim no authority for it. It was never adopted by the State—it cannot be said to have been adopted by the Presbyterian Church, for the *Presbyterian Church* had then no existence. But it contained at much length the views and wishes of many of the reformed clergy on the appointment of ministers :—placing that in the people, and, of course, gave to

their proposals to the government in 1565, great importance. They had also the serious grievance to complain of, that no regular power to *examine* the presentees was acknowledged, or acted upon in many cases, and that they were settled without any collation or admission by the clergy or Church. But their proposals were received with suspicion, and, indeed, were at first calculated to excite just suspicions, even on the part of a more friendly government than that of Mary.

In reply to the objections stated by the government, the following message in a different spirit was, in 1565, sent by the General Assembly of the clergy to the Queen, to which I entreat your attention:—"Our mind is not that her Majesty, or any other patron, should be deprived of their just patronages, but we mean, whensoever her Majesty, or any other patron, do present any person into a benefice, *that the person presented should be tried and examined by the judgment of learned men of the Church, such as are the present superintendents*, and as the *presentation unto the benefice appertains unto the patron, so the collation by law and reason belongs unto the Church*; and the Church should not be defrauded of the collation no more than the patrons of their presentation; for otherwise, if it be lawful to the patrons to present whom they please, *without trial or examination*, what can abide in the Church of God but mere ignorance."

These principles were just, moderate, and rational. It will be observed that in this document, the clergy did not pretend to limit *in principle* the nomination or presentation to the benefice. On the contrary, the presentation and collation are put as co-relative matters, the one being the nomination, the other the admission by trial of the presentee if found qualified. Further, you will remark, that the claim or complaint is—not for any check on the *selection* by the patron, in order to give *others* a voice in the selection, or (what is the same thing practically) a rejection of the nominee, but is for a right in the *Church* to try the *qualities* of the nominee, as the true and only control they could ask for, which could be consistent with the right of selection and nomination to the office vested in the patrons. Nothing, however, was *then* done: But a foundation was laid for future and cautious and salutary legislation.

In 1567, a variety of statutes were passed—being the first Parliamentary institution of any regular establishment, and the first attempt to frame any thing like a system of ecclesiastical polity. The acts and arrangements in 1560 by the Queen's Commissioners she had refused to ratify, and though partly acted upon, whereby the Church acquired some system and consistency in the interval, yet the state of things was anomalous in the extreme.

The first acts to which I call your attention are Chapters 2 and 3 of the year 1567.

Chap. 2 of the acts of that year, ratifying the act 1560, to which the Queen's assent had not been given, enacts, "The three estaitis, understanding that the jurisdiction and authoritie of the Bischop of Rome, called the Pape, used within the realme in times by-past, hes not onely bene contumelious to the eternal God, but also very hurtful and prejudicial to our soveraines authoritie and commoun weill of this realme, Theirfoir it is statute and ordained, that the Bischop of Rome called the Pape, have na jurisdiction nor authoritie within this realme in ony time cumming," &c. "And that na Bischop nor uther Prelat of this realme use ony jurisdiction in time cumming, be the said Bischop of Rome's authoritie, under the paine foresaid," &c. Chap. 3, ratifying another act of 1560, repeals all acts in favour of the Popish Church, or contrary to the Confession of the Faith and doctrine professed by the Protestants of Scotland, *which* this act approves of, ratifies, and engrosses at length. I would request your Lordships to look to Chap. 17 of this Confession of Faith, which gives a general description of the Catholic or Universal Church;—To Chapter 21, as to general councils condemning expressly the authority claimed for the same by the Church of Rome, and stating two grounds for holding the same;—the one the confutation of heresies, and the other "for gude policie and ordour to be constituted and observed in the kirk." This Confession of Faith, then, and the acts of this year, contain no claim or assertion of any power or authority in the Church, as inherent in the same and as against the State, to regulate any matter by a legislative power possessed by itself without the sanction and aid of the State.

Then came Chap. 6, which you will find in the additional appendix I handed to the Court. It is as follows: "Our Sovereine Lord, with advise of his three Estaites, and hail bodie this present Parliament, hes declared and declaris the *Ministers* of the blissed Evangel of Jesus Christ, quhome God in his mercie hes now raised up amangs us, or heirafter sall raise *agreeing with them that now lives*, in doctrine and administration of the Sacraments, and the peopil of the realme that professis Christ, as he is now offered in his Evangel, and dois communicate with the halie Sacraments (as in the reformed Kirkes of this Realme ar publicklie administrat,) *according to the confession of the faith*, to be the trew and halie Kirk of Jesus Christ, *within this Realme*, and decernis and declaris, that all and sindrie, quha uther gainsayis the word of the Evangel, received and apprevd, as the heads of the Confession of the faith, professed in Parliament of befoir, in the zeir of God, 1560 zeires: As alswa specified and Registrat in the actes of Parliament, maid in the first zeir of his Heinesses Reigne, mair particularlie dois expresse, ratified alswa and apprevd in *this present Parliament*; Or that refusis the participation of the halie Sacraments, as they ar now ministrat; to be na members

“ of the said Kirk, within this realme, and trew Religion, now
 “ presently professed. Sa lang as they keep themselves sa divid-
 “ ed, from the societie of Christ's body.”

You will observe how crude and rough is this first sketch, as it may be called, of a national Church. But it is a faithful and just statement of the *principle* of the *thing done*. The State could adopt any faith or persuasion it chose—being the representative of the nation. It might have replaced Popish Idolatry by Greek Superstition. It takes a certain set of tenets, contained in a document engrossed in the acts of that year, as the *doctrines* which they intended to adopt and sanction. Thus, in point of *doctrine*, the Standard of the Church is statutory. Its faith as an establishment is the work of statute. The ministers professing these tenets are *declared* to be the true and holy Church of Christ within *this* Realm—just as any other persuasion acceptable to the people and its Parliament might, *arbitrio communitatis*, have been adopted. The *polity* again was equally crude—but the polity was also wholly of statutory creation and institution.

After this general legislation, Parliament proceeded in the next statute to provide for the important practical point of the nomination and settlement of ministers. Byc. 7. (of 1567) “ *Anent the Ad-*
 “ *mission of Ministers. Of Laick Patronages* :—It is statute and
 “ ordained by our Sovereine Lord, with advise of his dearest Regent,
 “ and Three Estaites of this present Parliament, that THE EXA-
 “ MINATION and ADMISSION of *ministers*, within this realme, be
 “ *only* in the power of the *Kirk*, now openlie and publicly profes-
 “ sed within the samin. *The presentation of laic patronages al-*
 “ *waies reserved to the just and auncient patrones*. And that
 “ the patroun present *ane qualified persoun* within sex monethes
 “ (*after it may cum to his knowledge, of the decease of him quha*
 “ *bruiked the benefice of before,*) to the *superintendent of thay*
 “ *partis* quhair the benefice lyes, or uthers havand commission of
 “ the kirk to that effect; *utherwaies* the Kirk to have power to
 “ dispone the samin to *ane qualified person for that time*.

“ Providing, that in caice the patron present *ane person quali-*
 “ *fied to his understanding*, and failzeing of ane, ane uther within
 “ the said six moneths, and the said superintendent, or commis-
 “ sioner of the Kirk, *refusis to receive and admit the person pre-*
 “ *sented* be the patron, as said is: It sall be lesum to the *patron*
 “ to appeale to the *superintendent* and ministers of *that province*
 “ *quhair the benefice lyes*, and desire the person presented to be
 “ admitted, *quhilk gif they refuse*, to appeale to the *General As-*
 “ *semblie of the haill realme*, be quhome the cause beand decyded,
 “ *sall take end, as they decerne and declair*.”

Some remarks on this statute I must make before leaving it. Presbytery had not been established. Nay, presbyteries had not

been formed. That is admitted. The institution of presbyteries dates from 1581—though some provincial synods of the superintendent and ministers were in use to meet. Accordingly the presentation is to be directed to the *Superintendent*—that sort of substitute for Archbishops, out of which first the Court and then King James hoped, and in 1572 the plan of the Court seemed to succeed, to work gradually the readoption of Bishops of the provinces. Two points are here fixed—as *distinct*, but as equally *clear, decided*, and important in favour of the two parties whose rights are thus brought to a settlement. 1. The *nomination* remains with the *one* body, the ancient patrons. 2. The *examination* with the *other*, the Church. With either no *third* party is supposed to have a right to interfere. The former, the nomination, was a *prior* civil right. It is *acknowledged* and *secured*. To make it work for the good of the Church and consistently with the reformed faith, a power of examination is given to the Church. Now, then, is it not clear that, except in the manner and to the extent of *the check* thus imposed by the grant of a particular power to a specified party, the first principle of construction applicable to such an enactment is, that no *other* check, *no control over the selection*, can be understood against the right *reserved* entire, except as to this special check? And how is a power of rejection,—by another body altogether than the superintendent, without trial, and by a party not entitled by this act to try,—to be reconciled with, or drawn by any conceivable construction out of, the grant to the *superintendent* of *special* power to try and examine the presentee's qualities. I think the Court will also admit to me that this first sketch of an establishment clearly demonstrates that the *power of collation*, that is, of the examination and admission of ministers, is *statutory*—bestowed wholly by statute, in order that the benefice might not at once be filled by the presentation, without regard or reference to the Church. This in any Church is a gross abuse. At the period in question, it would have been an abuse not only in respect of the insufficiency of the persons appointed, but probably as a means of counteracting wholly the settlement of ministers of the new and reformed faith. Hence the *power* of collation is given to the Church, but *given* it is, and by *statute*. Again, the power so given imports a *duty* towards the State and towards the patron by the express terms of the enactment. For the refusal, though on trial, is a deliverance against which the patron may appeal and obtain redress.

Just let me observe in passing, that, in treating of this statute, Sir George Mackenzie says expressly, that the right of presentation is the right of nomination to the *office* of minister. All the authorities take the same view. And, with the extensive field before me, I am gratified to find that I am relieved from the necessity of citing proof of that proposition—for, important as the point is to

the argument—my friend has not disputed that the patron's right is not merely of giving the temporalities of the cure, but is of *nomination* to the *office*. Here also the established and uniform style of presentations from the Reformation, is of moment as a faithful exponent of the acknowledged principle and object of the presentation. The style is—"Considering that the *Church* and "*parish* is now vacant, and become at my gift and presentation," &c.,—"and I being sufficiently informed of the literature, &c. of "*A. B.*, do *nominate* and *present* the said *A. B.* to be *minister* of "*the said parish and Church*—giving, granting, and disposing to "*him*," and then follows the gift of the temporalities.

Again—when the Church *jure devoluto* present: they exercise *pro hac vice* the right of the patron to present—and in *their* case also the nomination to the office is by right of patronage.

I have said that this point is vital to the argument of the defenders. Because I am well aware that, in some quarters,—though not in the better considered and more sober argument of the Procurator of the Church—an attempt has been made to defend the Veto Act, and to reconcile it with the previous decisions of the Court, as to the extent of your Lordships' jurisdiction, by maintaining, that the patron's right applies only to the temporalities of the cure; that the nomination to the *office* is not by the presentation, but is purely and solely ecclesiastical, and separate from the patron's right; hence that the Church may regulate this nomination; and so, that, though an evil, the right to the temporalities may, regularly, constitutionally, and on principle, come, by the separate working of the two distinct and unconnected things, to be disunited and separated from the person nominated. No lawyer has ever maintained this doctrine. It is the view of fanaticism—disregarding all laws, and especially these statutes of which 1567 is the first.

I shall afterwards advert fully to the argument on the latter part of this statute, on which finality is claimed for the decisions of the Church—an argument utterly fallacious. But to one part of the pleas founded by Mr Bell on this act, it will be more convenient to advert before leaving it. He maintained that, in 1690, this statute 1567, c. 7, was revived in *all* its parts, *by implication*, while a part of the subsequent act in 1592 establishing presbytery, was by the same implication to be held as omitted, and not revived. I will presently discuss this notable discovery, that any part of the Great Charter of Presbytery is to be taken as repealed, or not revived, by implication. But the argument in favour of the revival at the Revolution in *all* its parts of the act 1567, in preference to and against, the express declaration of the statute 1592, is certainly a very singular argument on the part of the Church of Scotland.

(1.) It would, indeed, be most extraordinary, if, at the restora-

tion of Presbytery at the Revolution, the main act to be revived and restored, and called into activity in all its parts—an act, too, not specially noticed in 1690—should be a statute passed *before Presbytery was either instituted in the Church*—or broached even by the Church; or *established by the state*—and not the statute which established and described Presbytery in all its characters.

(2.) But under this act 1567, the presentation is to be directed to the *superintendent*, or others having commission to that effect from the Church.* This part of the act is not applicable:—is wholly inconsistent with these principles of Presbytery—1. parity of its members, and 2. that all ecclesiastical authority and jurisdiction and power is vested in the members of the presbytery of the bounds.

(3.) The six months allowed to the patron, were by this act to run from the date when the prior incumbent's death came to his knowledge. This Court has decided on the suit of the Church itself, that owing to the terms of the 10 Queen Anne, this part of the act is not in force, and that the six months run from the date of the death.

(4.) It is very remarkable that this statute neither provides for, nor contemplates, any right whatever on the part of the congregation, even to state and substantiate *valid* objections to the presentees,—for it will not fail to be noticed, that, if the superintendent receives and admits the presentee, no provision is made for an appeal by any party whatever against such settlement,—the only right of appeal allowed or provided for being to the patron, if the superintendent refuses to receive and admit his presentee. Hence in this most important particular the act is not applicable.

(5.) Again, when finality is claimed on this statute, not merely as to the ecclesiastical *cause*, but as to all points whatever, for the decisions of the Church courts, observe that, be the character and effect of the finality what it may, the finality in this act is for the decision of the *General Assembly* in a process of *review*, in which the right of appeal and of obtaining redress is the first principle,—a process utterly at variance with the Veto Act, the principle of which, on the other hand, is the abandonment of the power and duty by the Presbytery of judging, in the first instance, of the objections to the presentee, and the exclusion of an appeal, exactly because the presbytery had pronounced, and could pronounce, no opinion or judgment of their own:—Whereas the act 1567 gives an appeal against the judgment on the qualities of the man. How, then, by any provision, this part of the statute can shield from the jurisdiction of this Court, a rejection in respect of the Veto,—which rejection is not reviewable by the General Assembly, to whose judgments alone any finality was given by the statute 1567,—or exempt from your cognizance a measure utterly inconsistent with this statute, I am at a loss to understand.

No doubt this is a valuable statute: I am willing to appeal to it along with my learned friends. It gives us, in clear and precise terms, some of those great general principles as to the conditions of the establishment of a National Church, which may be in vain sought for in the history of many of the Reformed Churches of Europe. But it is vain to represent this act, as in observance, or as applicable, in all its details and regulations. It was in truth intended for a totally different system of ecclesiastical polity. I have not a doubt that the Parliament, and the Court especially, alike of Mary and James, (for I believe it would be difficult to say which was in heart the most hostile to the true liberty, and the true faith, of the Church of God,) were willing to entrust a great deal of power to *superintendents* which they would not entrust to *presbyteries*; and the entire change of enactment, when presbytery was established in 1592, shows that the *regulations* of this statute 1567 were not confirmed, as the model on which to prescribe and define the powers of presbyteries.

I need not remind the Court, in passing, of the whole series of decisions, which utterly rejects the finality now claimed for the decisions of the Church under this act 1567, c. 7.

This sort of rough draught of a system of ecclesiastical polity, if it even deserves the name, was soon followed by the celebrated meeting of the Convention of Estates at Leith in 1572, which established and restored the order of Bishops, and sanctioned their jurisdiction and authority to certain effects:—Though superintendents were still retained, and fortunately for Scotland, General Assemblies continued, by whose struggles the great object of abolishing Episcopacy was ultimately accomplished. This act of the Convention was acknowledged by the General Assembly at Perth on the part of the Church,—and acquiesced in—reluctantly indeed, and with a grieved spirit, and a wounded heart, but acquiesced in,—by Knox himself, then approaching the end of all his struggles, while the object of his labours seemed to be removed further from his hopes. Your Lordships will find his letter in Dr Cook's History.

Soon after the death of Knox, Andrew Melville came from Geneva, zealous for the Presbyterian form of Church government, and with a spirit equal to his predecessor, though of much less sound judgment, and of views partaking of the character of fanaticism. And here, my Lords, let me remind you of the great change in the opinions of the clergy, which the removal of the stern and sober judgment of Knox, and the zeal of Melville, soon produced. Hitherto the doctrine—so false in principle—so thoroughly unscriptural—so pernicious in results, and so fatal in its influence on the passions and conduct of men,—the fruitful source of oppression, whether held by Episcopalians or Presbyterians,—that any one form of church government is prescribed in scripture,

and is of divine right, had not been held by the reformed clergy in Scotland. Knox was too great a man in talent, judgment, and statesmanlike qualities, to countenance an error, which only fortified the pretensions, and fostered the hopes, of the adherents of the Church of Rome. True, he and his great associates attached the utmost importance to the form of church government which might be established, and strenuously contended for a polity which might secure purity of doctrine, simplicity—solemn and impressive simplicity of form and worship; and the most efficient control over the ministers of the Church,—the control of free deliberating bodies, where all were on equality. And to such a form they claimed the authority which ought to be allowed in every state to the Church of God. But they went no further.

For the change which occurred, I will refer to Dr Cook's History of the Church of Scotland *after* the Reformation.

LORD GILLIES.—Which work?

His second work,—of the Church *after* the Reformation, the continuation in short:—A work, I believe, unrivalled in any language, either for felicity of narrative, or for impartiality and discrimination,—a work in which divines and statesmen may learn the correction of many errors too common in both, as to ecclesiastical polity and government.

In Volume i. p. 247, Dr Cook gives an account of the first steps taken by Melville towards the introduction of presbytery, and of a discussion in an Assembly in 1595, in which he first propounded his views, maintaining that the state or degree of Bishops was contrary to scripture, and that there could be no superiority among ministers allowed by Christ,—Then at p. 249, he says, “These principles merited the most serious consideration, for they not only struck directly at the ecclesiastical arrangements, which had been in some degree sanctioned and established, but they tended completely to subvert those maxims, by which the Reformers had hitherto been invariably guided. Knox, and they who venerated his authority, had avowed the liberal and rational doctrine, that no particular form of church government had been exclusively prescribed by scripture, and that it was a question of expediency, though a most serious and important one, what form should, under all the circumstances of any one country, be adopted. The tendency of this doctrine was most salutary. It excluded, at least it naturally did so, bigoted attachment to modes and arrangements affecting the constitution of a Christian society, preventing those who embraced it from circumscribing the Church of Christ by the narrow limits of a sect or a party, inclining them to consider every church as pure and apostolical which promoted the great ends for which re-

“ligion was given, enlightening the mind with the doctrines of revelation, and guiding to that renovation of heart and life,—to that moral sanctity which makes men happy here, and prepares them for a more exalted state of existence beyond the grave. Melville placed the matter upon a very different, and in the agitated and inflamed condition of men’s minds, upon a most alarming foundation. His object plainly was, to support the innovations which he sought to introduce, by the authority of the sacred record, and to represent all by whom they were finally rejected, as acting in opposition to the mandates of that record. In short, he introduced that doctrine of the divine right of forms of ecclesiastical polity, which exerted in Scotland the malignant influence that might have been anticipated from it; which extinguished the feelings, and hardened the hearts of those who gloried in supporting it; which spread all the rancour of exasperated bigotry throughout the community, and gave rise to scenes of intolerance and of persecution, which must, in the course of this history, be exhibited, but from which every humane and Christian spirit must shrink with the strongest disapprobation.”

On these views the struggle for the establishment of the National Church began, and when I come to show you the pretensions of the Church, on the one hand, and the cautious discrimination of the Legislature on the other in its enactments, you will at once perceive the impossibility of admitting the general claim for legislative power, or for legislating on this particular matter of the rights of patrons and the *appointment* of ministers, now brought forward in such unqualified terms by the Church,—terms, I admit, however, not more general and unqualified than the defence of this measure necessarily requires.

In the subsequent pages of Dr Cook’s History, you will find a detailed account of the preparation of the *Second Book of Discipline*, which was intended to embody the views of Melville and his friends; and to contain the exposition of doctrines as to ecclesiastical matters, of which they hoped to obtain the sanction of the government. The preparation of it went on during several years, and in 1578–9, there were various discussions with the Commissioners of Parliament as to the doctrines thus propounded by the ministers for the foundation and basis of a national Church. An account of some of these discussions is given in Dr Cook, Vol. i. p. 282.

It is in a portion of Archbishop Spottiswoode’s account of one of these conferences, in 1579, that Mr Bell found a marginal note, from which he seemed to think he could satisfactorily derive the extensive legislative power now claimed for the Church; and justify such an enactment as that under consideration. It is almost trifling to deal with such an argument in such a case. Archbi-

shop Spottiswoode gives an account of this conference; and opposite to the clauses in the Second Book of Discipline, which he engrosses, he puts down the opinion of the Commissioners for the Government at this particular conference.

For example, he quotes the following clause:—"9th, In this ordinary election it is to be eschewed that no person be intruded in any of the offices of the Church, contrary to the will of the congregation to whom they are appointed, or without the voice of the eldership." To which the Archbishop marks on the margin "Agreed."

Under a different head there is another clause. "11th. They have power also to abrogate and abolish all statutes and ordinances concerning ecclesiastical matters that are found noisome and unprofitable, and agree not with the time, or are abused by the people." To which the Archbishop marks on the margin "Agreed, that as they make acts on spiritual things, so they may alter the same as the necessity of time requires."

On these marginal notes in this account of a conference which came to nothing, Mr Bell actually claims supreme power and authority to legislate for the Church. What a charter for the Church to stand upon! What a foundation on which to rest such mighty constitutional powers for an Established Church! A marginal note in the prejudiced and inaccurate work, which the General Assembly condemned, of this treacherous Archbishop, whom the General Assembly both deposed and excommunicated; and declared in the stern words of their sentence to be infamous, and fit to associate only with ethnicks and publicans. The Church should now for their own sake do him posthumous justice, and since they cannot canonize him, at least by recalling the sentence, *rehabilitate* the *witness* to whom they are forced to appeal.

But in founding on the report of this conference, which preceded even the adoption and approval of the Second Book of Discipline by the General Assembly itself, by whom it was not finally adopted and recorded till 1581, Mr Bell might at least have looked to what Spottiswoode says as to the *result* and *effect* of this conference. Bishop Spottiswoode, introducing the notes of this conference, says, he records it to show "how these affairs went, and *what effect* the commission took." At the *close* of it he says, "This was the form of policy presented to the Parliament, and the effect of the commission granted for the same. Such general heads as did not touch the authority of the King, nor prejudged the liberty of the Estate, were easily agreed. The rest were passed over or deferred, as we have seen, to farther reasoning, which *could not after this time be obtained of the council*, one excuse or other being still pretended. The ministers perceiving that they *would not speed this way*, did in their next

“ Assembly resolve to put their conclusions in *practice, without insisting any more for ratification thereof.*”

Indeed, so little progress even was made by this conference, that, as you will find in Dr Cook, Vol. i. 290, the Assembly, in October of that year, lectured the Lord Chancellor in good round terms for not obtaining the sanction and adoption which they desired for this scheme and exposition of ecclesiastical polity.

I may mention, in passing, that the same sort of answer is noted on the margin opposite to the clause claiming the right of appointment of ministers for the presbyteries, as matter of doctrine. Yet Mr Bell does not maintain *that* to be part of the law of the land, or assert even on the part of the Church any such abstract right or doctrine. Then how is he to pick out one point in a conference which led to no result, and produced discontent on both sides, on which as a foundation to rear up powers and rights for the Church not granted ultimately by Parliament.

These notes of the conference preserved by Spottiswoode contain valuable proof, however, that all parties were fully aware of the *extent and character* of the *pretensions* made by the Church to power, derived directly from Divine authority; and of the practical results which would follow from admitting such pretensions. And the fact, that the attention of those acting for the State was thus early called, to the point of Divine right, propounded by the Church as the source of its power, and to the authority under which it claimed the right of legislation, gives additional importance to the statutory enactments which ultimately were passed. One clause in the Second Book of Discipline, under the Head of the Kirk and Policie thereof, (C. 1. § 5,) as copied by Spottiswoode, is in these terms: “ 5. For this power ecclesiasticall flowes immediatlie from God and the Mediator Jesus Christ, and is spirituall, not having a temporall heid on earth bot onlie Christ, the onlie spirituall King and Governure of his Kirk.”

Spottiswoode preserves the following note of the opinion of the Commissioners on this alarming pretension, “ Say instead hereof, “ For this power is spiritual not having:—deleting the other words.”

The clause would, so altered, read—“ For this power ecclesiastical is spiritual”—rendering the clause very harmless. As worded in the Second Book of Discipline, you will observe it would give boundless power to the church, irreconcilable with all civil authority, and tending directly to produce utter confusion. If power in a question with the state or as to civil rights is once conceded to a Church as derived directly from Divine authority, where can limitation consistently be found? Or who is to explain and define the extent to which the power must be carried, and the occasions on which it is to be exercised, but the body which receives it.

This Second Book of Discipline was adopted, however, by the General Assembly in 1581.

In that same year, 1581, the *King* gave his consent to the establishment of presbyteries throughout the bounds of the Church. But the Bishops who had professed the Protestant faith, and their successors, remained still in office, and retained *jurisdiction*—clashing, as it often did, with the claims, rather than the rights, of the Church. No Act of Parliament had been passed in favour of any scheme of polity, different from that adopted by the convention of Estates at Leith in 1572, or adopting any part of the Second Book of Discipline.

In 1584, the Court, whose great object was to prevent the power and influence which the clergy wished to gain, and to deny to a pure and independent Church the institutions, which it was seen would foster and cherish so directly throughout the country the Spirit of Freedom, caused various acts of Parliament to be passed, which were utterly subversive of all jurisdiction whatever in the Church, either in the collation of ministers, in the decision of ecclesiastical matters, or as to any other points essential to the liberty of a Protestant Church. Three acts were passed in that year. I must request your Lordships not merely to attend to the provisions of these statutes, but, in particular, to note the *chapters* in the acts of that year containing the several enactments then made, for the recollection of the chapters of these acts is of much importance in considering one part of the subsequent Act 1592, C. 116.

C. 129, of 1584, is in these terms:—

“ For sa meikle as sum persones being lately called befor the
 “ King’s Majestie and his secreit Council; to answer upon certaine
 “ points to have bene inquired of them concerning some treason-
 “ able, seditious, and contumelious speaches, uttered by them in
 “ Pulpit, Schooles, and utherwaies, to the disdaine and reproch
 “ of his Hienes, his Progenitours, and present Council, contem-
 “ tuouslie declined the judgement of his Hienes, and his said
 “ Council in that behalfe, to the evil exempil of utheris to do the
 “ like, gif timous remeede be not provided. Therefor our Sove-
 “ raine Lord, and his three Estaites assembled in this present
 “ Parliament, ratifies, and apprevis, and perpetually *confirmis*
 “ *the royal power, and authoritie over all Estaites, alsweil Spiritu-*
 “ *al, as Temporal*, within this Realme, in the person of the Kingis
 “ Majestie, our Soveraine Lord, his aires and successours: And
 “ als statutis and ordanis, that *his Hienes*, his saidis aires and
 “ successours, be themselves, and their *councelles*, ar, and in time
 “ to cum *sall be judges competent to all persones* his Hienes sub-
 “ jectes, of *quhatsumever estaite*, degree, function, or condition
 “ that ever they be of, *Spiritual or Temporal*, in all matters,
 “ quhairin they, or ony of them sall be apprehended, summond,
 “ or charged to answer to sik thinges as sall be inquired of them,
 “ be our said Soveraine Lord and his Council. And that nane of

“ them, quhilkis sall happen to be apprehended, called, or summoned, to the effect foirsaid, presume, or tak upon hand to decline the judgement of his Hienes, his aires and successours, or their Councel in the premisses, under the paine of treason.”

Chap. 131 of this same year, after a long preamble directed in part against ecclesiastical jurisdiction and ecclesiastical assemblies, proceeds to enact : “ Our Sovereine Lord, and his three Estaites, in this present Parliament, *dischargis all judgements, and jurisdictions, Spiritual or Temporal*, accustomed to be used and execute, upon ony of his Hienes subjectes, quhilkis ar not approved be his Hienes, and his saidis three Estaites, conveyened in Parliament ; and decernis the same to cease in time cumming quhill the ordour thereof be first seene, and considered be his Hienes, and his saidis three Estaites conveyened in Parliament, and be allowed and ratified be them : Certifying them, that sall proceed in using, and exercing of the saidis judgements, and jurisdictions, or in obeying of the same, not being allowed, and ratified, as said is, they sall be repute, halden, called, persewed, and punished as usurpers, and contemners of his Hienes autoritie, in exemple of utheris. And als it is statute and ordained, be our said Sovereine Lord, and his three Estaites, that nane of his Hienes subjectes, of whatsumever qualitie, estate, or function they be of, Spiritual or Temporal, presume or tak upon hand, to convocate, convene, or assemble themselves togidder, for halding of councelles, conventions, or assemblies, to treat, consult and determinat in ony matter of Estait, Civile or Ecclesiastical, (except in the ordinar Judgement) without his Majesties special commandement, or expresse license, had and obtained to that effect, under the paines ordained be the lawes and actes of Parliament, against sik as unlawfully convocatis the Kingis lieges.”

As if this statute was not a sufficient blow at the liberties of the Church, c. 132 of the same year proceeds directly to deprive the Church of its authority and jurisdiction over its ministers, and virtually deprives it of the power of collation. This act, c. 132, is entitled the Causes and Manner of deprivation of Ministers. “ Our Sovereine Lord, and his three Estaites, assembled in this present Parliament, willing that the word of God sall be preached, and Sacramentes administrat in puritie and sinceritie, and that the rentes, quharon the Ministers aucht to be sustained, sall not be possessed be unworthie persones neglecting to do the deutes, for whilkis they accepted their benefices, being utherwaies polluted with the fraill and enorme crimes, and vices after specefied. It is therefor statute and ordained be his Hienes, with advice of the saidis three Estaites, that all Persones, Ministers, or Readers, or utheris provided to benefices, sen his Hienes Coronation, (not having vote in his Hienes

“Parliament,) suspected culpable of heresie, papistrie, fals and
 “erroneous doctrine, commoun blasphemie, fornication, commoun
 “drunkennes, non-residence, plurality of benefices having cure,
 “quhairunto they are provided sen the said Coronation, Simonie
 “and dilapidation of the rentes of benefices, contrare the lait Act
 “of Parliament, being lawfully, and ordourly called, tryed, and
 “adjudged culpable, in the vices and causes above written, or onie
 “of them, be the ordinar Bishope of the diocese, or *utheris the*
 “*Kingis Majesties Commissioners, to be constitute in Ecclesias-*
 “*tical causes*, sall be deprived alsweil fra their function in the
 “Ministrie; as from their benefices, quhilkis sall be thereby de-
 “clared to be vacand; to be presented and conferred of new, as
 “gif the persones possessors thereof were naturally dead.” Vari-
 ous other provisions are then made which vest all jurisdiction
 whatever in the Bishops or Ordinary of the bounds, or in the
 King's Commissioners in ecclesiastical causes.

I need not point out the effect of these various statutes. They destroyed the Church; they left it no liberty or independence; and they crushed the rising institutions and power of Presbyteries.

But there was a spirit awakened in Scotland, mightier far than acts of Parliament or the influence of the Court. The spirit of the ministers was not crushed. They fought on steadily to the end. I need not go over the progress of the contest, in which they gained all that was rational, great, and good in their designs—but as unquestionably did not gain the powers of legislation claimed by them, which were seen to be inconsistent with all civil authority and civil jurisdictions, and did not establish the schemes which proposed to sweep away at once the rights of patrons, as against the doctrines of the Bible.

A final conference at last took place in 1591–2, between the King and a committee of ministers, in consequence of petitions presented by the Church to the Parliament. In Dr Cook, Vol. i. 465, you will find a reference to all the authorities which give an account of the important discussions which ended in the act 1592.

To the Second Book of Discipline, I must now request the very particular consideration of your Lordships.—But in doing so, I think it very necessary to request you to observe not merely the expressions in particular passages, but the views of Church government which it was intended to further and establish.

There were two great points which its authors were mainly desirous to carry, and the system is very skilfully, elaborately, and methodically constructed, for the promotion of the views of its authors on these points.

The first leading principle which they desired to establish was, that the Church had an authority and power committed to it directly from God—that the form of government was derived from

that source, and was to be exercised by all the office-bearers of the Church—and that such were to govern the Church leaning on the scriptures as the measure of their power.

The second principle was, that the office-bearers of the Church should be appointed by the Church itself; because the nomination to the ecclesiastical office could only come from spiritual authority, and none ought to be named to the office of the ministry but those who were named by spiritual authority: and, with a view to the full scope of this principle, they were further desirous to establish, that the *benefice* was something quite distinct and apart from the *office of the minister* in that benefice, and that the benefice meant nothing else than the provision for the temporal maintenance of the minister.

These two principles, if once granted, would, in their practical development and operation, have prostrated the State completely at the feet of the Church. No scheme of Papal power and authority could have reached further. The authority claimed for the Pope did not rest upon so pure and high a ground, if the ground is true: And, on the other hand, as the authority thus claimed was to be exercised by a popular Church government,—by the ministers of the whole Church,—the results of the influence and power so asserted would have been infinitely more absorbing and overwhelming.

In the exposition of these two principles will be found the key to the Second Book of Discipline. The first part of it consists of an account “of the kirk and policy thereof,” and of the persons who “are to bear office in the same;” and the next part consists of a statement of the composition and powers of the Church courts—the presbyteries and assemblies.

The first portion includes, from cap. 1 to cap. 6 inclusive; and I particularly advert, now, to this distinction in the objects of the work, because it will be found, that when the Legislature came to settle the discipline and policy of the Church in 1592, after the conference between the King and the ministers upon the Book of Discipline, the whole of this portion—being the exposition of general views and the assertion of the powers of Church—was carefully laid aside, and the practical parts which follow, cautiously and exclusively adopted, leaving out, as it will be found, even in those parts, what touched or supported the powers claimed for the Church.

With this general explanation, let me now direct your attention to the first nine sections of the first chapter. I read from Mr Peterkin's Compendium of the Laws of the Church, Vol. i. p. 109. The chapter is entitled, “Of the Kirk and Policie thereof in general, and quherein it is different from the Civil Policie.” And the sections are these:—

“ 1st. The Kirk of God is sumtymes largelie taken, for all
 “ them that professe the Evangill of Jesus Christ, and so it is a
 “ company and fellowship, not onely of the godly, but also of hy-
 “ procrites professing alwayis outwardlie ane true religion. Uther
 “ tymes it is takin for the godlie and elect onlie, and sumtymes
 “ for them that exercise spiritual functions amongis the congre-
 “ gation of them that professe the truth.

“ 2d. The kirke in this last sense hes a *certaine power grantit*
 “ *by God*, according to the quhilke it uses a proper jurisdiction and
 “ government, exercisit to the comfort of the hole kirk. This
 “ power ecclesiasticall is an authoritie grantit be God the Father,
 “ throw the Mediator Jesus Christ, unto his kirk gatherit, and
 “ having the ground in the word of God; to be put in execution
 “ be them, unto quhom the spirituall government of the kirk be
 “ lawful calling is committit.

“ 3d. The policie of the kirk *flowing from this power* is an
 “ order or forme of spirituall government, quhilk is exercisit be the
 “ members appoyntit thereto be the word of God; and therefore
 “ is gevin immediately to the office-beararis, be quhom it is exer-
 “ cisit to the weile of the hole bodie. This power is diverslie
 “ usit: For sumtyme it is severally exercisit, chiefly by the teach-
 “ aris, sumtyme conjunctly be mutuall consent of them that beir
 “ the office and charge, efter the forme of judgement. The former
 “ is commonly callit *potestas ordinis*, and the uther *potestas ju-*
 “ *risdictionis*. These two kinds of power have both one authority,
 “ one ground, one finall cause, but are different in the manner and
 “ forme of execution, as is evident be the speiking of our master
 “ in the 16th and 18th of Matthew.

“ 4th. This power and policie ecclesiasticall is different and
 “ distinct in the awin nature from that power and policie, quhilk
 “ is callit the civill power, and appertenis to the civill government
 “ of the commonweith: albeit they be both of God, and tend to
 “ ane end, if they be rightlie usit, to wit, to advance the glorie of
 “ God, and to have godlie and gude subjects.

“ 5th. For this power ecclesiasticall flowes immediatlie from
 “ God, and the Mediator Jesus Christ, and is spirituall, not hav-
 “ ing a temporall heid on earth, but onlie Christ the onlie spiri-
 “ tuall King and Governour of his kirk.

“ 6th. It is a tittle falslie usurpit be Antichrist, to call himself
 “ heid of the kirk, and aucht not to be attribute to angel nor man,
 “ of what estait that ever he be, saving to Christ the onlie heid
 “ and monarch of the Kirk.

“ 7th. Therefore this power and policie of the Kirk, sould leane
 “ upon the word immediatlie, as the onlie ground thereof, and
 “ sould be taine from the pure fountaines of the Scriptures, the
 “ Kirk hearing the voyce of Christ, the onlie spirituall king, and
 “ being rewlit be his lawes.

“ 8th. It is proper to kings, princes, and magistrates, to be callit
 “ lordes, and dominators over their subjectis, whom they govern
 “ civilly, but it is proper to Christ onlie to be callit Lord and
 “ Master in the spirituall government of the Kirk, and all utheris
 “ that beiris office therein, aucht not to usurp dominion therein,
 “ nor be callit lordis, bot onie ministeris, disciples, and servantis.
 “ For it is Christis proper office to command and rewill his Kirk
 “ universall, and every particular Kirk, threw his spirit and word,
 “ be the ministrie of men.

“ 9th. Notwithstanding, as the ministeris and uthers of the ec-
 “ clesiasticall estait are subject to the magistrat civil, so aucht the
 “ person of the magistrat be subject to the Kirk spirituall and
 “ in ecclesiasticall government. And the exercise of both these
 “ jurisdictiones cannot stand in one person ordinerlie. The civil
 “ power is callit the power of the sword, and the uther the power
 “ of the keyes.”

The second chapter I need not further advert to, than to state
 that, in the sixth section, it describes, the four ordinary functions
 or offices in the Kirk of God to be the office of the pastor, mi-
 nister, or bishop; the doctor; the presbyter or elder; and the
 deacon.

The third chapter is a very important one, and I must read it
 at length from Mr Peterkin's work, p. 113. “ How the persones
 “ that beir ecclesiasticall functiones are admitted to thair office.”

“ 1. Vocation or calling is common to all that sould beir office
 “ within the Kirk, quhilk is a lawfull way, be the quhilk qualifiet
 “ persones are promotit to any sprituall office within the Kirk of
 “ God; without this lawfull calling it was never leisum to any
 “ person to medle with any function ecclesiasticall.

“ 2. There are twa sorts of calling, ane extraordinar be God
 “ himself immediatelie, as war of the prophetis and apostiles,
 “ quhilk in Kirks establishet, and well already reformit hes no
 “ place.

“ 3. The uther calling is ordinair quhilk besydes the calling of
 “ God, and inward testimonie of a gude conscience, hes the law-
 “ full approbation and outward judgement of men, according to
 “ Godis word, and order establishit in his Kirk. Nane aucht to
 “ presume to enter in any office ecclesiasticall without he have this
 “ testimonie of a good conscience before God, who only knowis the
 “ hartis of men.

“ 4. This ordinair and outward calling, hes *twa* parts, *election*
 “ and *ordination*. *Election* is the *chusing out* of a person or per-
 “ sons maist able to the office that vaikes, *be the judgement of the*
 “ *elderschip*,” (that is of the Presbyteries—all are agreed that the
 term Eldership means Presbyteries,) “ *and consent of the congre-*
 “ *gation*, to whom the person, or persons beis appointed. *The*

“ *qualities* in generall requisite in all them wha sould beir charge in the Kirk, consist in *soundness of religion*, and godliness of lyfe, according as they are sufficiently set furth in the word.

“ 5. In this ordinar election it is to be eschewit, that na person be intrusit in ony of the offices of the Kirk, contrar to the *will of the congregation* to whom they are appointed, or without the voice of the elderschip. Nane aucht to be intrusit, or placeit in the places alreadie plantit, or in any rōume that vaikes not, for any wardlie respect: and that *quhilk* is callit the *benefice* *aucht to be nothing else but the stipend of the ministers that are lawfullie* callit.

“ 6. Ordinatione is the separation and sanctifying of the persone appoyntit to (the old manuscripts have “ by”) God and his Kirk, EFTIR HE BE WEILL TRYIT AND FUND QUALIFIET. The ceremonies of ordinatione are fasting, earnest prayer, and imposition of hands of the elderschip.

“ 7. All thir, as they must be raisit up be God, and be him made able for the work quhairto they are callit; so aucht they know their message to be limitit within God’s word, without the quhilk bounds they aucht not to passe. All thir sould take these titils and names onlie (leist they be exaltit and pufit up in themselves) quhilk the Scriptures givis unto them, as these quhilks import labour, travell, and wark; and are names of offices and service, and not of idleness, dignitie, warldlie honour or preheminance, quhilk be Christ or Maister, is expresslie reprovit and forbidden.

“ 8. All these office-beararis sould have *their awin particular flockis* amongst whom they exercise thir charge, and sould make residence with them, and tak the inspection and oversight of them, every ane in his vocation. And generallie thir twa things aucht they all to respect, the glorie of God, and edifieing of his Kirk, in discharging their dewties in their callings.”

The selection of the persons to bear office in the Church is here claimed, you will observe, exclusively for the Church, for the presbyteries or eldership. In order the more fully to establish this principle, you will observe the anxiety with which, in the fifth section, the attempt is made to limit the meaning of the term *benefice*, to the temporality or stipend due to those called by the Church. Of the practical importance of this view I need say nothing. It was a great point for the clergy to establish in the promotion of their objects, and would at once have destroyed all right of nomination of ministers in any party but the Church.

You will also permit me to fix your attention very particularly upon the *terms* employed in describing *fitness* for the offices in the Church. You will observe in section fourth the term employed is

"*qualities*," and then the qualities are stated to consist in soundness of religion and godliness of life. And again in the sixth section, the ordination is stated to be the sanctifying of the person after he be *well tried* and *found qualified*. Thus, then, it will be observed that the term "*qualified*" was one known to be approved of and used by the Church, and further, that the Church had *described* the *qualities* requisite for those who were to be appointed to the minister to consist of soundness of religion and Godliness of life. When, therefore, the Legislature, in settling what should be the policy of the Church, specially adopted this term *qualified*, and declared that the patrons might present, and the Church should receive, any *qualified* person, they made a provision, the terms and meaning of which the Church had itself expounded to them, and as to which there could be no mistake. Indeed, in all the previous expositions of the views of the reformed clergy, the same explanation had always been given of the *qualities* requisite in the ministers, however they were to be appointed. They were to be examined, the First Book of Discipline said, "in life and manners, in doctrine and knowledge." In short, the Church had uniformly explained the *qualities* required, to be, what the plain meaning of the term imports.

In chapter 4th the following principle is asserted, Peterkin, p. 116. "They that are callit unto the ministrie or that offer themselves thereunto, aucht not to be electit without ane certain flock be assignit unto them."

"Na man aucht to ingyre himselfe, or usurpe this office without lawfull calling."

Then in chapter 7th, the second part of the Book commences, being the statement and description of the Church Courts, and their powers, and that chapter treats of the Elderships or Presbyteries, and Assemblies, and their Discipline.—Peterkin, p. 119.

"1. Elderships and Assemblies are commonlie constitute of pastors, doctors, and sick as we commonlie call elders, that labour not in the word and doctrine, of quhom, and of whais severall power hes bene spoken.

"2. Assemblies are of four sortis. For either ar they of particular kirks and congregations ane or ma, or of a province, or of ane haill nation, or of all and divers nations professing one Jesus Christ.

"3. All the ecclesiasticall Assemblies have power to convene lawfully togidder for treating of things concerning the kirk, and pertaining to thair charge. They have power to appoynt tymes and places to that effect; and at ane meeting to appoynt the dyet, time and place for anuther.

"4. In all assemblies ane moderator sould be chosen be common consent of the haill brethren convenit, who sould propone

“ matters, gather the votes, and cause gude order to be keipit in the assemblies. Diligence sould be taken, chiefly be the moderator, that onlie ecclesiasticall things be handlit in the Assemblies, and that there be na meddling with onything pertein-
“ ing to the civill jurisdiction.

“ 5. Every Assembly hes power to send furth from them of thair awin number ane or moe visitours to sie how all things beis
“ rewlit in the boundis of thair jurisdiction. Visitation of mae
“ kirks is na ordinar office ecclesiastick in the person of ane man,
“ naither may the name of a Bischop be attribute to the visitor
“ onlie, naither is it necessar to abyde alwayes in ane man's per-
“ son, but it is part of the elderschip to send out qualifiet persons
“ to visit, *pro re nata*.

“ 6. The finall end of all assemblies is, first, to keip the religion
“ and doctrine in puritie, without error and corruption. Next, to
“ keip cumliness and gude order in the kirk.

“ 7. For this orders cause, they may make certane rewls and
“ constitutions appertaining to the gude behaviour of all the mem-
“ bers of the kirk in thair vocation.

“ 8. They have power also to abrogate and abolish all statutes
“ and ordinances concerning ecclesiasticall matters that are found
“ noysome and unprofitable, and agrie not with the tyme, or ar
“ abusit be the people.

“ 9. They have power to execute ecclesiasticall discipline and
“ punishment upon all transgressors, and proud contemnners of the
“ gude order and policie of the kirk, and swa the haill discipline is
“ in thair hands.

“ 10. The first kynde and sort of assemblies, although they be
“ within particular congregations, yet they exerce the power, autho-
“ ritie, and jurisdiction of the kirk with mutuall consent, and
“ therefore beir sumtyme the name of the kirk. When we speik
“ of the elders of the particular congregations, we mein not that
“ every particular parish kirk can or may have thair awin parti-
“ cular elderschips, specially to landwart, bot we think thrie or
“ four, mae or fewar particular kirks, may have ane common elder-
“ schip to them all, to judge thair ecclesiasticall causes. Albeit
“ this is meit that some of the elders be chosen out of every par-
“ ticular congregation, to concurre with the rest of their brethren
“ in the common assemblie, and to take up the delations of of-
“ fences within their awin kirks, and bring them to the assemblie.
“ This we gather of the practise of the primitive kirk, where elders
“ or colleges of seniors were constitute in cities and famous places.

“ 11. The power of thir particular elderschips, is to use dili-
“ gent labours in the boundis committed to thair charge, that the
“ kirks be kepit in gude order, to inquire diligently of nauchtie
“ and unruly persons, and to travell to bring them in the way

“ again, either be admonition, or threatening of God’s judgements,
 “ or be correction.

“ 12. It pertaines to the elderschip to take heid that the word
 “ of God be purely preichit within their bounds, the sacraments,
 “ rightly ministrat, the discipline rightly mantenit, and the eccle-
 “ siasticall gudes uncorruptlie distributit.

“ 13. It belonges to this kynde of Assembly, to cause the ordi-
 “ nances made be the Assemblie’s provincially, nationall, and gene-
 “ rall to be keepit, and put in execution. To mak constitutions
 “ quhilk concerne τὸ πρεσβυτεριον in the kirk, for the decent order of
 “ these particular kirks where they governe ; provyding they al-
 “ ter no rewls made by the generall or provincially assemblies, and
 “ that they mak the provincially assemblies foresein of these rewls
 “ that they sal mak, and abolish them that tend to the hurt of the
 “ same.

“ 14. It hes power to excommunicat the obstinat.

“ 15. The power of election of them *who beir ecclesiasticall*
 “ *charges*, perteinis to this *kynde of assemblie*, within thair awin
 “ bounds, being well erectit, and constitute of many pastors and
 “ elders of sufficient abilitie.

“ 16. By the like reason *their deposition* also perteinis to this
 “ kynde of assemblie, as of them that teich erronious and corrupt
 “ doctrines ; that be of sclanderous lyfe, and efter admonition de-
 “ sist not ; that be gine to schisme or rebellion against the kirk, and
 “ manifest blasphemy, simonie, corruption of brybes, falsett, per-
 “ jurie, whoredome, thift, drunkenness, feghting worthy of punish-
 “ ment be the law, usurie, dancing, infamie, and all uthers that
 “ deserve separation fra the kirk ; these also who are fund alto-
 “ gither unsufficient to execute their charge sould be deposit—
 “ quhair of uther kirks wald be advertisit, that they receive not
 “ the persons deposit.

“ 17. Yet they aucht not to be deposit, wha throw age, sick-
 “ ness, or uther accidents, become unmeit to do thair office ; in the
 “ quhilk case thair honour sould remain to them, their kirk sould
 “ maintain them ; and uthers aucht to be providit to do thair office.

“ 18. Provincially assemblies we call lawful conventions of the
 “ pastors, doctors, and uther eldaris of a province, gatherit for the
 “ common affaires of the kirkes thereof, quhilk also may be callit
 “ the conference of the kirk and brethren.

“ 19. Thir assemblies are institute for weighty matters, to be
 “ intreatit be mutuall consent and assistance of the brethren with-
 “ in that province, as neid requyres.

“ 20. This assemblie has power to handle, order, and redresse
 “ all things ommittit or done amisse in the particular assemblies.
 “ It hes power to depose the office-beirirs of that province for gude
 “ and just causes deserving deprivation. And generallie thir as-

“semblies have the haill power of the particular elderships,
“whair of they are collectit.

“21. The nationall assemble, quhilk is generall to us, is a law-
“ful convention of the haill kirks of the realm or nation, where it
“is usit and gatherit for the common affaires of the kirk; and
“may be callit the generall eldership of the haill kirk within the
“realme. Nane ar subject to repaire to this assemble to vote
“bot ecclesiasticall persons, to sic a number as shall be thoct gude
“be the same assemble; not excluding uther persons that will re-
“paire to the said assemble to propone, heir, and reason.

“22. This assemble is institute, that all things aither omittit
“or done amisse in the provinciall assemblies, may be redressit
“and handlit; and things generally serving for the weill of the
“haill bodie of the kirk within the realme may be foirsein, intreac-
“tit, and set furth to Godis glorie.

“23. It sould take cair, that kirks be plantit in places quhair
“they are not plantit. It sould preseryve the rewll how the uther
“twa kinds of assemblies sould proceed in all things.

“24. This assemble sould tak heid, that the spirituall juris-
“diction and civill be not confoundit to the hurt of the kirk;—
“That the patrimonie of the kirk be not consumit nor abusit;
“and generallie concerning all weighty affaires that concerne the
“weill and gude order of the haill kirks of the realm, it aucht to
“interpone authority thairto.

“25. There is besydes these, another mair generall kynde of
“assemble, quhilk is of all nations and estaits of persons within
“the kirk, representing the universall kirk of Christ; quhilk may
“be callit properlie the Generall Assemble or generall councill
“of the haill kirk of God.

“These assemblies wer appoyntit and callit together special-
“ly when ony great schisme or contraversie in doctrine did aryse
“in the kirk, and were convocat at command of godlie emperours
“being for the tyme, for avoiding of schismes within the universal
“kirk of God; quhilk because they apperteine not to the particu-
“lar estait of ane realme, we ceis further to speak of them.”

I forbear to notice those parts of the Book of Discipline which
do not touch the points involved in the present argument, and I pass
over, therefore, what relates to the patrimony of the kirk,—the
limitation of the power of the civil Legislature,—the grievance
and abuse of orders or degrees among the clergy, as in the Epis-
copal polity, and many other matters. But I may notice the fol-
lowing sections in chapter 12th touching “certain special heads of
“reformation which we crave.”

“9. The libertie of the election of persons callit to the eccle-
“siasticall functions, and observit without interruption swa lang
“as the Kirk was not corruptit be antichrist, we desyre to be

“restorit and retenit within this realme. Swa that nane be intrusit upōn ony congregation, eithir be the prince or ony inferior person, without lawful election and the assent of the people owir quham the person is placit; as the practise of the apostolical and primitive Kirk, and gude order craves.

“10. And because this order, quhilk God's word craves, *cannot stand* with patronages and presentation to benefices usit in the Paipes Kirk; we desyre all them that trewlie feir God earnestlie to consider, that for swa meikle as the names of patronages and benefices, together with the effect thair of, have flowit fra the Paip and corruption of the canon law only, in so far as thereby ony person was intrusit or placit owir kirks having *curam animarum*. And for swa meikle as that manner of proceeding hes na ground in the word of God, but is contrar to the same, and to the said libertie of election, they aucht not now to have place in this licht of reformation. And, therefore, quhasumever will embrace God's word, and desyre the kingdom of his Son Christ Jesus to be advancit, they will also embrace and receive that policie and order quhilk the Word of God and upright estait of his Kirk craves, otherwise it is in vaine that they have profest the same.

“11. Notwithstanding as concerning uther patronages or benefices that have not *curam animarum*, as they speak; such as ar chaplanries, prebendaries, foundit upon temporall lands, annualls, and sick lyke, may be reservit unto the ancient patrones, to dispone thairupon, quham they vaike, to schulis and bursars, as they are requyrit be Act of Parliament.”

Now, then, the Court will see the views with which the Church went into the conference in 1592, and which were under the consideration of the Legislature when they passed the two acts in that year, and which, I agree, are to be viewed as one enactment, namely, cap. 116 and 117 of 1592.

I must go over them at length.

The Act, 1592, c. 116 is intituled “Ratification of the liberty of the trew Kirk: Of Generall and Synodal assemblie: Of Presbyteries: Of Discipline. All Laws of Idolatrie ar abrogate: Of presentation to benefices.—Our Sovereine Lord and Estaites of this present Parliament; following the lovabil and gude exemple of their Predecessours: Hes ratified and appreeved, and be the tenour of this present act, ratifies and apprevis all liberties, priviledges, immunities and freedoms quhatsumever, *given and granted* be his Hienesse, his Regentes in his name, or onic of his Predecessours, to the trew and halie Kirk, presently established within this Realm; and declared in the first Act of his Hienesse Parliament, the twentie day of October, the zeir of God, ane thousand, five hundreth, three-scoir ninetene

“zeires: and all and whatsumever Acts of Parliament, and statutes maid of before, be his Hienesse, and his Regentes; anent the libertie and freedom of the said Kirk: And specially, the first Act of the Parliament, halden at *Edinburgh*, the twentie foure daie of October, the zeir of God, ane thousand, five hundred, fourscore ane zeires, with the haill particular Acts there mentioned: Quhilk sall be als sufficient as gif the samin were here expressed. And *all other Acts of Parliament* maid sensine, in *favour of the true Kirk*; And siklike, ratifies and apprevis, the general Assemblies appoynted be the said Kirk: And declares, that it sall be lauchfull to the Kirk and Ministers every zeir at the least, and oftener *pro re nata* as occasion and necessity sall require, to hald and keepe general Assemblies: Providing that the King's Majesty, or his Commissioners with them to be appoynted, be his Hienesse, be present at ilk general Assemblie, before the dissolving thereof, nominate and appoynt time and place, quhen and quhair the nixt General Assemblie sall be halden: and in case naither his Majesty, nor his said Commissioners beis present for the time in that Toun, quhair the said General Assemblie beis halden: Then and in that case, it sall be lesum to the said General Assemblie, be themselves, to nominate and appoynt time and place, quhair the nixt general assembly of the Kirk sall be keiped and halden, as they have bene in use to do thir times by past. And als ratifies and apprevis, the Synodicall and Provinciall Assemblies, to be halden be the said Kirk and Ministers, twise ilk zeir, as they have bene, and ar presently in use to do, within every Province of this Realme; and ratifies and apprevis the Presbyteries, and particular Sessiones, appoynted be the said Kirk, with the haill *jurisdiction* and *discipline* of the same Kirk, *aggrieved upon by his Majesty in conference* had be his Hienesse, with certain of the Ministers, conveyned to that effect: of the *quhilk's articles the tenour followes*.

Your Lordships will observe the extreme caution with which this, the general, part of the statute is framed. There is no *general grant* of power or authority to the Church. The act ratifies and approves of the privileges *previously* granted by any former acts in favour of the True and Holy Kirk. But it goes no further. There is not a word, it will be observed, of acknowledgment of any power, authority, or jurisdiction not previously granted, or by this present act conferred. The Second Book of Discipline was before the government. It had been so for years. It was the scheme of the Church—long considered, well matured, and frequently discussed in conferences between the ministers and the Commissioners of the State. It contained an anxious description, intended for the adoption of the State, of the power and authority of the

Church, and of the principles which ought to regulate the appointment of its office-bearers. The whole of this general part of the Book of Discipline is laid aside. The Legislature merely confirms the privileges previously given by itself to the true Church. It sanctions the *form* of policy by Presbyteries, Synods, and General Assemblies, carefully omitting all notice of the powers claimed for the same, and leaving them simply to treat of the matters which belonged to the Church, and for which no further powers were necessary. But then the act further proceeds (being the first Parliamentary recognition and establishment of *presbyteries*) to set forth what authority and jurisdiction should belong to *them*: And this was very necessary. Previously, the superintendents had exercised a sort of Episcopal charge and authority within their bounds, aided by occasional but very irregular meeting of the clergy of the provinces. But the Church government had been in truth carried on by the General Assembly, in which every thing originated, and which was practically the only Church Court at least known to the Legislature. The principle of Presbytery was just the reverse. The presbyteries consisting of but a few members of a small number of contiguous parishes—the radical courts, as they were termed,—were to become the main and ordinary machinery for the government of the Church; all matters of discipline, of ecclesiastical jurisdiction, of collation, trial, deprivation, were to originate in *them*, with a power of appeal to the Synod, and then to the General Assembly. This is the great principle of presbytery, and hence in this act, (the Charter of Presbytery,) it was necessary to define the jurisdiction of these new courts, the presbyteries, which this act first recognized.

But how is that done? In the most cautious and anxious manner possible. You will observe that the statute approves of the presbyteries “with the hail jurisdiction and discipline of the Kirk,” “*agreed upon* by his Majesty, in conference had by him with certain of the ministers, *of the which articles the tenor follows.*” There is no general confirmation of the jurisdiction claimed by the Church either in its Assemblies or in its presbyteries. But there is an adoption of the jurisdiction and discipline, so *agreed upon*, the *specific articles of which* are embodied in the statute. And then when the articles of this jurisdiction and discipline are to be set forth, the Legislature lays aside the whole general part of the Book of Discipline contained in the first six chapters. Nay, it is very remarkable, if you will take the trouble of comparing the first part of the seventh chapter, as to the Assemblies of the Church for which the Second Book of Discipline claims very high powers and authority, the statute lays aside that general part also. It first introduces some very cautious and limited regulations as to the assemblies of the Church—limiting their province to matters of advice, and to the

powers competent also to presbyteries, and to the review of the proceedings of the latter, and then follows the important part of the act, for the present argument, relating to presbyteries.

When I come to the passage in the statute lying before your Lordships which relates to the presbyteries, I will take the liberty of reading the corresponding portion in the seventh chapter of the Second Book of Discipline, which the act embodies and transcribes (you will find almost identically,) in the words of the Book of Discipline, requesting your Lordships to compare what I read with the terms of the statutes.

Let me now proceed with the statute.

“ MATERS to be entreated in Provincial Assemblies : Thir Assemblies ar constitute for weichtie maters, necessar to be entreated be mutual consent, and assistance of brethren, within the Province, as neede requiris. This Assemblie hes power to handle, ordour, and redresse, all things omitted or done amisse in the particular assemblies. It hes power to depose the office-bearers of that Province, for gude and just cause, deserving deprivation : And generally, thir assemblies hes the hail power of the particular Eldershippes, quhairof they are collected. MATERS to be intreated in the Presbyteries.

(The Dean then turned to and read the corresponding passages in the Second Book of Discipline, and begged the Court to look to what follows in the statute.)

“ The power of the Presbyteries is to give diligent laboures in the boundes committed to their charge : That the Kirks be kepted in gude ordour, To enquire diligently of naughty and ungodly persons : And to travel to bring them in the way againe be admonition, or threatning of God's judgements, or be correction. It appertaines to the Elderschippe, to take heede, that the word of God be purely preached within their boundes. The Sacraments richtly ministred, the Discipline entertained : And Ecclesiastical guddes uncorruptly distributed. It belangs to this kinde of Assemblies, to cause the ordinances maid be the Assemblies, Provincialles, nationals and generals, to bee kepted and put in execution, to make constitutions, quhilk concernis to *prepon* (using the Greek term) in the Kirk, for decent ordour, in the particular Kirk, quhair they governe ; Providing that they alter na rules maid be the Provincial, or General Assemblies : And that they make the Provincial Assemblies fore-saids, privy of the rules that they sall make : And to abolish constitutions tending to the hurt of the same. It hes power to excommunicate the obstinate formal Process being led, and dew interval of times observed.”

Here the Statute stops, if I mistake not, and goes on as to particular kirks ; does it not ?

LORD GILLIES.—Yes.

But the Book of Discipline goes on as to the powers of Presbytery thus,—“ 15. The power of Election of them who beir *Ecclesiasticall* charges pertienes to this kynde of Assemblie within “ thair awin bounds being well erectit, and constitute of many “ pastors and elders of sufficient abilitie.” This is omitted in the statute—while all the preceding expressions are taken *verbatim* from the Book of Discipline, even the Greek expression.—Can any deduction, then, be clearer than this proof of the anxiety and deliberation with which the Legislature laid aside every portion and expression of the Second Book of Discipline which tended to vest vague and indefinite power in the Church,—to sanction the pretensions it had brought forward,—or practically to accomplish the ends already mentioned which the clergy had in view. It was the Second Book of Discipline which was before the State. It had been the subject of the conference. The question was, how much should be adopted? how much rejected? You see it takes the very words of the portion it meant to adopt.—It omits, even in the course of such portions, whatever went beyond the views of the State, and it lays aside altogether the general exposition of principles,—the acknowledgment of power in the Church;—the doctrine it asserted as to the calling of office-bearers,—and whatever tended to give to the Church the authority and power it was desirous to obtain. It wholly omits the assertion of the power to legislate. It wholly omits the two points of Doctrine respecting the election of ministers,—the nomination by the Church, and the will of the people. And yet the Church now tells us that they possess this very power to legislate, and that the will of the people must be sufficient to exclude any pastor to whom they object, in direct opposition to the anxious care with which the act 1592 excludes all acknowledgment of those points. I should like to know why the Church does not claim the actual right to nominate and appoint ministers. The one assertion would be as consistent with this statute as the assumption of the other point. They support the assumption of the latter by the authority of the Second Book of Discipline. If good to them for that purpose, it ought equally to support the other claim.

But I go on with the statute “ ANENT particular kirks, gif they “ be lauchfully ruled, be sufficient Ministry and Session. They “ have power and jurisdiction in their awin Congregations, in matters Ecclesiastical. And decernis and declairis the saids Assemblies, Presbyteries, and Sessiones, Jurisdiction and Discipline thereof foresaid, to be in all times cumming maist just, “ gude, and godly in theselfe, Notwithstanding of quhat-somever “ Statutes, Actes, Canone, Civill, or Municipal Lawes, made in “ the contrare. To the quhilkis and every ane of them, thir pre- “ sentes sall make expresse derogation: And because there ar

“ divers Actes of Parliament, maid in favour of the Papistical
 “ Kirke, tending to the prejudice of the liberty of the trew Kirk
 “ of God, presently professed within this Realme, jurisdiction and
 “ discipline thereof; Quhilk stands zit in the buikes of the Actes
 “ of Parliament, nocht abrogated nor annulled: Therefore his
 “ Hienesse, and Estaites foresaids, hes abrogated, cassed, and an-
 “ nulled, and be the tenour hereof, abrogatis, cassis and annullis
 “ all Actes of Parliament made be ony of his Hienesse Predeces-
 “ soires, for maintenance of superstition and idolatry, with all and
 “ quhatsumever Acts, Lawes and statutes, maid at ony time, be-
 “ fore the day and dait hereof, against the liberty of the trew
 “ Kirk, Jurisdiction and discipline thereof, as the samin is used
 “ and exercised within this Realme.

“ And in speciall, that part of the Act of Parliament halden
 “ at *Striviling*, the fourth day of *November*, the zeir of God,
 “ ane thousand, four hundredth, fourty three zeirs, commaund-
 “ ing obedience to be given to *Eugenius* the Paipe for the time:
 “ the Acte made be King James the *thrid*, in his Parliament
 “ halden at *Edinburgh* the twenty four day of *Februar*, the
 “ zeir of God, ane thousand, four hundredth, fourscore zeires:
 “ and all utheris actes quhairby the Paipis authority is establish-
 “ ed. The Acte of King James the *thrid*, in his Parliament
 “ halden at *Edinburgh*, the twenty day of *November*, the zeir of
 “ God, ane thousand, four hundredth, three score nine zeires,
 “ anent the Satterday, and uther vigiles to be halie dayes, from
 “ Evensang to Evensang.

“ ITEM, that part of the Act, maid by the *Queene Regent*, in
 “ the Parliament halden at *Edinburgh*, the first day of *Februar*,
 “ the zeir of God, ane thousand, five hundredth fifty-ane zeirs,
 “ giving special licence for holding of *Pasche* and *Zule*. ITEM
 “ The Kingis Majesty, and Estaitis, foresaidis, declaris, that
 “ the 129 Acte of the Parliament, halden at *Edinburgh*, the xxij
 “ day of *Maij*, the zeir of God, ane thousand, five hundredth,
 “ fourscore, four zeires, sall naways be *prejudiciall*, nor *derogate*
 “ *ony thing* to the privilege that God has given to the spirituall
 “ office-bearers in the Kirk, concerning heads of Religion, mat-
 “ ters of Heresie, Excommunication, collation or deprivation of
 “ Ministers, or ony siklike essential censours, especiallie ground-
 “ ed, and havand warrand of the Word of God.”

Observe it is chapter 129 of the Act 1584 which is here referred to. This, you will remember, is the general act giving the King and his Council authority and jurisdiction, not only over all Estates, spiritual as well as temporal, but constituting them judges as to all persons whether of spiritual estate or functions; and in all matters, although spiritual. Without actually repealing this act, it is declared not to derogate from the privileges of the Church in the matters herein specified;—but you will recollect,

that another statute in the same year, cap. 132, vested in the Bishops, and other judges appointed by the King in ecclesiastical causes, the power of collation and corresponding jurisdiction. This, then, was to be repealed. Provision was to be made for *vesting* the power of collation *in the Presbyteries*: Here was the fitting occasion to regulate and provide for the appointment and nomination of ministers, *according as the Legislature choose to regulate the matter*: And the provision actually made is a *grant* to Presbyteries of the power of Collation, and a reservation to patrons of their right of nomination, followed also with an imperative obligation on Presbyteries, in order to secure that right.

“ITEM, Our Sovereine Lord, and Estaitis of Parliament foresaids, abrogatis, cassis, and annullis, the Act of the same Parliament, halden at *Edinburgh*, the said zeir, ane thousand, five hundredth, fourscoir four zeires, granting commission to Bishopschoppes, and utheris Judges, constitute in Ecclesiasticall causes, to receive his Hienesse presentations to benefices, to give collation thereupon: and to put ordour in all causes Ecclesiasticall: quhilk his Majesty and Estates foresaidis, declaris to be expired in the selfe, and to be null in time cumming, and of nane avall, force nor effect. And therefore ordainis all presentations to Benefices, to be direct to the particular Presbyteries, in all time cumming: with full power to give collation thereupon; And to put ordour to all maters and causes Ecclesiasticall, within their boundes, according to the discipline of the Kirk: Providing the foresaids Presbyteries be bound and astricted, to receive and admitt quhatsumever qualified Minister, presented be his Majesty, or laick patrones.”

The general expressions in the second last sentence, “to put order to all matters, and causes ecclesiastical according to the discipline of the Kirk,” are in truth equally guarded with the rest of the act: 1. That is given to *Presbyteries*, and so draws back to the general description of the powers of Presbyteries; 2. It is of matters and causes *within their bounds* which excludes all *general legislation*, and limits the expression to the matters and causes arising within their bounds. 3. It imports *opinion* and *judgment* by the Presbytery itself, leading to a review by the superior Church Courts. 4. “According to the discipline of the Kirk,” are words equally guarded, for it relates to the discipline respecting Presbyteries, and that had been previously defined and settled in the most precise, explicit, and guarded manner.

The next act is clearly part of the same enactment. “Act 1592, c. 117. Unqualified persones being deprived, the benefice vaikis, and the Patron not presentand, the richt of presentation pertaines to the Presbytery, but prejudice of the tackes, set be the person deprived.

“Our Sovereine Lord Considering the great abuses quhilkis

“ ar laity croppen in the Kirk, throw the misbehaviour of sik
 “ persones, as ar provided to Ecclesiasticall functions : sik as
 “ Parsonages and Vicarages, within ony parochin, and thereafter
 “ neglecting their charge, ather leave their cure, or els commit-
 “ tis sik crimes, faultes, or enormities, that they ar found worthy
 “ of the sentence of deprivation, ather before their awn Presby-
 “ terie, or else before the Synodall or Generall assemblies. Quhilk
 “ sentence is the lesse regarded be them, Because albeit they be
 “ deprived of their function and cure within the Kirk : zit they
 “ thinke they may bruike lawfully the profites and rentes of
 “ their saids benefices, enduring their life-rentes, notwithstanding
 “ the said sentence of deprivation : Therefore, our Sovereine
 “ Lord, with advice of the Staitis of this present Parliament,
 “ declaris, that all and quhatsumever sentences of deprivation,
 “ ather pronounced already, or that happenis to be pronounced
 “ hereafter, be ony Presbyterie, Synodall, or General assemblies,
 “ against ony Parson or Vicar, within their Jurisdiction, provid-
 “ ed sen his Hienesse Coronation : All Parsones, provided to
 “ Parsonages and Vicarages, quha hes voit in Parliament, secreit
 “ Councell and Session, or provided thereto of auld, before the
 “ Kingis Coronation, (And Maister *George Young*, Arch-dean
 “ of *Saint Andrewes*, being especially excepted,) is, and sall be
 “ repute in all Judgementes, ane just cause to seclude the per-
 “ son before provided, and then deprived from all profites, com-
 “ modities, rentes and dewties of the said Parsonage and Vicar-
 “ age, or benefice of Cure : And that ather by way of action,
 “ exception, or reply. And that the said sentence of depriva-
 “ tion, sall be ane sufficient cause to make the said Benefice to
 “ vaikie thereby. And the said sentence being extracted, and
 “ presented to the Patron, the said Patrone sall be bound to pre-
 “ sent ane qualified person of new to the Kirk, within the space
 “ of sex moneths thereafter : And gif he failzie to do the same,
 “ the said Patrone sall tine the right of presentation, for that
 “ time allanerly : And the richt of presentation to be devolved
 “ in the handes of the Presbytery, within the quhilk the benefice
 “ lies ; to the effect that they may dispoone the same, and give
 “ collation thereof, to sik an qualified person as they sall think
 “ expedient. Providing allwayes, in case the Presbytery refuses
 “ to admit ony qualified Minister, presented to them be the Pa-
 “ trone ; It sall be lauchfull to the Patrone to retain the hail
 “ frutes of the said Benefice in his awin handes.”

Now, then, on these Acts of Parliament, I think I may safely
 ask your Lordships, whether most of the propositions I ventured
 to state yesterday are not already satisfactorily established ? As
 to the claims on the part of the Church, I would wish to know
 what exactly is the *Plea* regarding the Second Book of Discipline,

and the deductions my learned friend made from it? Is it that the Second Book of Discipline is the law of the land? Then if they go on article 5, declaring that there could be no intrusion of any pastor against the *will* of the congregation, and defend the veto act, because this doctrine, being in the Second Book of Discipline, is part of the law of Scotland; why do they not also go on the *preceding* article, and maintain that patronage and election are in the presbytery or eldership? The one article must be in force as well as the other, if you go beyond the Act of Parliament, and claim authority for the Second Book of Discipline. Is their plea, that the Second Book of Discipline is the law of the Church? Then they should claim the power of election, and every other power asserted in the Book of Discipline. But after this statute, what laws of the Church, inconsistent with the statute *on points specially provided for*, or *sedulously omitted to be granted* to the Church, can be recognized in a court of justice? Here, again, attend to the importance of Mr Bell's question, "Who was authorized in this conference to *give up the rights of the Church?*" You will now see the importance of the point involved in this question, and the extraordinary position taken by the Church, when, after the lapse of two centuries and a half, they wish to throw open the conditions, on which they were thus formally adopted by statute as an establishment, and to revive the notion of inalienable power, derived from divine right. I say that, whether in *ecclesiastical or civil matters*, the Church got no power to legislate or regulate any matter, inconsistent with the provisions of this statute, or *beyond* its purview and the powers specially granted.

A Compact! The term, in truth, puts the matter in too favourable a light for the pretensions of the Church. This statute is—institution—is establishment—is the *grant* and concession to the Church of all the powers which it was intended it should possess, by the body (the State) which had the unrestricted power to institute or create—to adopt or reject—to form and modify and establish as it chose.

The review of this plain history of the foundation and settlement of the Church of Scotland irresistibly demonstrates that it is wholly of statutory creation, of statutory authority, and statutory jurisdiction. Its powers are the result of special statutory grant. Its claims and pretensions were fairly, manfully, and openly announced, and pressed on the state. The power it wished to obtain, it openly claimed without mystery, and gloried in the exposition of scripture, from which it claimed that power for the good of the Church and the honour of God. But these claims were rejected as clearly as they were made. Many years were consumed in conferences and discussions regarding them. The result was—this anxiously framed and explicit statute. Did

not that establish the Church? Is not that the Charter of Presbytery? But *out of* that statute what is the Church? Had it any independent power recognized by the state, remaining to it entire untouched and supreme, though not noticed in or granted by the statute? Then why pass any act at all? If the powers, not granted by the statute, equally belong to the Church; of what use was the Act? or why legislate on part of the polity, while the remainder,—aye, and the more important part of the polity and power of the Church,—is supposed to exist independently of the aid or interposition of Parliament?

But the statute surely is pre-eminently the *origin* and *measure* of the *power of collation*. The Act 1584, c. 129, had derogated from that privilege. The Act 1584, c. 132, had vested it in the bishops, or, what was worse, in the judges appointed by the King in ecclesiastical causes. Here were two statutes to be got rid of. The Act 1592, c. 16, declares, that the former of these shall not interfere with the privileges of the true Church. It then repeals the latter, and *gives* the power of *collation* to the presbyteries, and enacts in their favour that presentations are to be directed to them, in order that they give collation thereon. Then who can reasonably doubt, that, taking the question as a point in the jurisdiction of an Established Church, the power of collation, that is, the check by trial and examination of the presentee over the nomination in another party, is of statutory origin, and that the church is limited by the enactment, which bestows the power, in the exercise and application and construction of the power it so receives. Do not let us confound this point with any notions of what, in point of true doctrine, must belong to every Church, as among the members of its own persuasion, when no civil rights are concerned. In every religious persuasion—among all dissenters,—I take for granted that their clergy have the power of collation,—that is, to examine and admit persons named to be pastors over particular congregations among them. That is admitted to them by those who adhere to them. But the present question relates—to the position of an Established Church, when there existed, *anterior to its institution*, a *civil right* of patronage, giving right to parties to name to the office of minister of the different parishes—and to the origin in *that* case, as in a question with this civil right, of the power of collation. It is clear on principle,—clear on the face of the Act 1592, and indeed of the act 1567, that, unless the power of collation had been given to or conferred on the Church by statute, they could have had no power to interfere with and control the nomination made in the exercise of the civil right. True, it was essentially necessary for the interests of the Church, that they should receive and possess such a power of collation: But still they receive it from statute: And it is

to be taken as wholly statutory in origin and authority, when a civil question arises in a Court of Law as to the extent of the authority which it implies,—whether it implies a power of imposing new conditions on the exercise of the civil right of patronage, or of permitting another party to reject the presentee.

But I must request your attention more particularly to the terms of the concluding provisions in 1592, c. 116 and 117.

(1.) The first observation I would submit is, that, by the terms of the act 1592, c. 116, it is clear that, 1. The presentation completes the *nomination*. 2. The presentation and the trial by the Church complete the *right*.

I say that the *presentation* completes the *nomination*. There is no trace of any approval,—of any confirmation by any other party being necessary or required or provided for. The presentation is to be *addressed* to the *presbyteries*. They are the bodies with whom the presentee has to deal—who are to judge of him, and, *according to the trial*, to admit or not. In the Second Book of Discipline, that is, in the very scheme of ecclesiastical polity under discussion with the State at the framing of this statute, great stress was laid on the *assent* or *will* of the congregation. This was not a point, therefore, overlooked by the parties framing this statute. The rights, or claims, or interests of the congregation were pleaded high and authoritatively by the ministers. But as the State would not recognize the power of election claimed by the ministers, so, on the other hand, they equally set aside the control claimed for the congregation over the choice of a minister. They assumed and acknowledged the existing *rights of patrons* as the *basis* of legislation. They gave the presbyteries, as was fitting, the power of collation. But they recognized no third body whatever. The presentation was to be addressed to the presbytery, and *then they* were to act judicially as Church courts. The principle of this enactment plainly implies, 1. That there is no other party or act to the *title* but the patron's nomination. 2. That there is no other party or act intervening or competent between the patron and the judgment of the presbytery,—no power by another party to exclude the presentee from being tried. 3. That the presbytery are to act in the matter as the only party to whom the review of the patron's selection is committed. 4. That still less can any other party put a veto on the power of the presbytery, and reject a presentee whom the presbytery wish to take on trials—know to be qualified, and intend to settle as a qualified pastor. 5. That the presbytery have no power to delegate or abandon their power and duty of collation, by taking the opinion and votes of another body instead of their own deliberate judgment as a church court. To them, as a church court, the

power and duty of collation is committed, *because it was right* that the *Church* should judge of the *qualities* of the man appointed; but abandonment of that duty, or the substitution of the will of a party which is not a church court, is utterly inconsistent with the ground upon which alone the power of collation was claimed by and given to the Church.

Again,—I say the *presentation* and the *trial* complete the *right*. There is no trace of any other act or condition being contemplated or imposed by the statute,—no restriction on either patron or presbytery,—no *condition precedent* to the presbytery exercising their function supposed to be possible, much less imposed. Yet this Veto Act, you will remember, declares that it is only *if* there is *no dissent* by the major part of heads of families that the presbytery can proceed. The statute assumes that the person presented shall and must be judged of by the presbytery, and no other act than the admission of the Church after trial by them is referred to in order to complete the right.

The presentation is *nomination* to the *office* of the ministry. Accordingly, if the patron forfeits his turn, the Church exercises the same right of nomination. In fact, there is no other mode of entering the office of the ministry in Scotland but by the right of presentation to a parish, in whomsoever it is vested. You will recollect the Second Book of Discipline states the principle, always enforced in the Church of Scotland, that there can be no *ministerium vagum*. Every person ordained to the office of the ministry must be appointed to a congregation, in whatever way he is nominated.

(2.) The second observation I would wish to press is, that the statute does establish one *condition*, and *one* condition only, on the selection by the patron of his presentee, “Whatsumever qualified person agreeable to the will of the people.”

LORD GILLIES.—*That* is not in the statute.

DEAN OF FACULTY.—No, my Lord, neither in words, spirit, or substance. I was about to try the defenders' construction. (Lord G. I beg your pardon)—but I admit the difficulty of doing so, without at once shewing the repugnance of the terms employed to the plea they raise on the statute. I take it then simply, “Whatsumever qualified minister.” Well, then, what does that mean? The presbytery is to examine:—Well, “*qualified* person!”—in whose judgment? Is it not in opinion of the presbytery on such trial. If the person is qualified in *their* judgment when tried, what other requisite has the patron to satisfy? “Agreeable to the people”—that is not in the act, as your Lordship said—and really I cannot better put the illegality of such a con-

dition, or the unsoundness of such a construction, than simply by that answer.

(3.) The third observation I have to urge is on the *duty* and *obligation* imposed on the presbytery by this statute.

The statute provides, that the presbytery be *bound* and *astricted* to admit *whatsomever qualified minister* is presented by the King or patrons. No, says the Church—not if the people first reject him.

Mr Bell seemed to feel the full force of these concluding words in the statute, and he got rid of this astringent clause by the notable discovery that it was repealed. Of that presently. But, in the meantime, assuming that it is in force, I did not hear one word from him as to the *import* of the clause, or the *extent* and *meaning* of the *obligation* so imposed. The terms are not obscure—"bound and astricted"—These are words of *obligation*—of *limitation*—that is, they limit the power of examination and admission to that presentee. They *can examine* no other, and are *bound* to examine him. They can admit no other—except *jure devoluto*. This is a provision, in favour of the civil right, and against the Church, clearly introduced in consequence of the pretensions of the Church against patronage. The presbytery are limited to that person, and are bound to admit him if qualified:—Such is the enactment: Now is that to be set at nought? We are told that presbyteries are independent even if they do wrong—where is that irresponsible power to do wrong—that exemption from the control of the Supreme Civil Court *given* to them? Here is a civil duty *imposed*: As they receive the *power*, so are they to exercise the *duty* of collation. Then why is the presbytery at liberty to do wrong in the face of the Act of Parliament?

Let us take an analogous case. The Act 1690 gives presbyteries the superintendence of schools and schoolmasters. The question arose in *M'Culloch v. Allan*, (Fac. Coll. 1800, Morrison, 7471,) whether this power was ecclesiastical and could be reviewed by the civil court, or only by the superior Church courts. There was a long discussion on the point. At last the House of Lords found that this superintendence was an *ecclesiastical* duty, and that review lay to the Church courts only. Then in order to avoid the delay of such appeals to the General Assembly, the Act 1803 made the judgment of the presbytery final, and specified the extent of their jurisdiction, and the mode of exercising it.

The Church was, I believe, much dissatisfied with the Legislature thus cutting in with the broad axe upon their system of ecclesiastical procedure, and many of its members thought that the exclusion of the review by the superior Church courts of the judgments of presbyteries in a proper ecclesiastical matter found

by the House of Lords to be proper for their cognizance only, was an unconstitutional encroachment on the system of Presbytery established by law. Be it so:—But if a strong measure, it was so only because the review by the superior courts is a fundamental law of presbytery. But the reason for which I notice this statute is this: The Legislature declared that the *trial* of schoolmasters, charged with delinquencies and neglect of duty and general inefficiency, should be exclusively and finally with the presbyteries. Now a case occurred, precisely analogous in principle to the present, which tested the soundness of the pleas now maintained by the Church, viz. that though the statute imposes a duty and obligation on the Church courts, yet, *because* they are *ecclesiastical* tribunals, that duty cannot be enforced in the civil court—that you must leave them to fulfil their duty or not, according to their consciences,—that they are exempt from any amenability to the *civil* tribunals, and that, as ecclesiastical bodies, the civil court cannot *direct* and cannot *compel* them to act. I refer to the case of *Ramsay v. Heritors of Corstorphine*, March 10, 1812. Fac. Collection.

The heritors of the parish laid before the Presbytery, in terms of the statute, an accusation against the schoolmaster for an offence inferring gross misconduct. On a particular ground—a misapprehension as to the meaning of the act 1701, it was believed, but no matter from what cause—the Church court, the presbytery, *refused to enter on the trial* of the man. The heritors brought the matter before the civil court, in order to have the Presbytery ordained to enter on the trial. The question came before the First Division. Your Lordship will remember the case. (Lord President—Perfectly.) I would very earnestly refer to the opinions of the Court, reported at considerable length. The Court held, that while they could not review any judgment the presbytery pronounced, or touch any sentence, if the procedure was regular, and if the presbytery acted within the statute, yet, that if they *refused* to act and enter on the functions and duties (decided, be it remembered, by the House of Lords, and acknowledged by the act 1803 to be *ecclesiastical* duties and functions,) committed to and imposed on them by statute, they were liable to be set right; that wrong was then done which the civil court could redress; and that the mode of redress was to *direct and ordain* them to *proceed to do their duty* under the statute, and to *enter* upon the performance of the functions and trust imposed by the obligations of the statute. You found that they were *bound* to enter on the trial of the schoolmaster, and discharge their duty under the statute, though an ecclesiastical duty, and you *ordained* them to do so. I will not take up time by reading the opinions. I beg attention to them. They are decisive as to the pleas, 1.

That an obligation imposed by the Legislature on the ecclesiastical courts cannot be enforced by the civil courts, but that if violated and disregarded, the Legislature, forsooth, is to interfere to enforce its own enactment, as if the question was with a foreign independent state; and 2, (if a different plea) that the ecclesiastical tribunals, being independent, there can be no direction or order on them, or on the individuals who compose them, for such order cannot be enforced by the diligence of law. It will be found that the Court amply acknowledged the duty to be ecclesiastical, and that, in the exercise of their duty, (so long as their acts were *competent*,) the ecclesiastical body was not under the control of, or its proceedings reviewable by, this Court: but then, as clearly and without doubt it was held that a duty and obligation imposed by statute, even on an ecclesiastical body, and an ecclesiastical duty—could be *enforced* by this Court, and the presbytery *ordained to discharge it*. I sum up the opinions in the concluding sentence of your Lordships' opinion, which sentence, in truth, embodies the whole case. "We can compel them to act." That is what I ask in this case. Now in principle what distinction is there between the case referred to and the present? Had the presbytery refused to obey the decree pronounced in the Corstorphine case, they might have been charged upon the decree, and sent to prison if they set the civil power at defiance. The Court armed the party with that power:—Now what is the case here? The Church declares that the presbytery shall not take on trial the presentee if the people dissent. The statute declares that the presbytery *shall admit and receive every qualified person*. They defend the refusal by the plea, that an obligation imposed by the statute on an ecclesiastical body, cannot be enforced by the civil court, because the Church courts are independent of your jurisdiction, and, therefore, that the refusal to enter upon the duty and function committed to them by statute, is without redress in a court of law,—that this violation of the statute and this confusion of all authority, can only be remedied by the Legislature, and that the individual wrong is without redress. Now is not this the very plea maintained in the case of Corstorphine? To save time, I refer your Lordships to the report of the case, in which you will find that the exclusion of the jurisdiction of this Court was strenuously maintained—that the Court of Session had no concern, it was said, with what they did—"that there was no subordination of the Church courts to any civil courts in the country"—"that the Church judicatories are in ecclesiastical matters supreme"—"that if there could be any review of what they did in not discharging their functions, they could only be answerable to the superior Church courts." Now these are exactly the pleas in the present case. The independence asserted for the Church courts is the very

same—the exemption from civil jurisdiction here claimed is what was there asserted—the incompetency of compelling them to act is equally the point in both the cases. The judgment is unquestionably in point.

But the extravagance of the consequences to which such pleas would lead, and the utter confusion which would be introduced if such doctrines on the part of an establishment could be listened to, are well brought out by another point in the Schoolmasters' Act. You are aware that the statute directs that the schoolmasters chosen by the heritors shall be examined by the presbyteries, as to their learning and qualifications in the matters prescribed; and in order to secure such examination by the presbytery to the heritors and parish, it is declared that an extract of the sentence of the presbytery, after trial of the party and finding his qualifications, is necessary to complete his title to the office of parish schoolmaster, and to enforce payment from the heritors of his allowance: So that the *interest* of the party is to be examined, if qualified. Now, suppose that the presbytery refuse to proceed to examine a person elected schoolmaster:—They know that he is qualified—may be a better scholar than themselves,—and that they can state no objection to his doctrine, life, or conversation: but they don't like him—he is of different politics in Church and State from them: They have many of those incommunicable but valid grounds of objection, which Mr Bell thinks ought to be fostered and encouraged in regard to presentees, and so the presbytery won't take him on trial. Some of the heritors then refuse to pay his allowances,—they may naturally doubt the fitness of a man not examined,—at all events, he cannot enforce payment, for the sentence examining him is his only statutory title for exacting payment. Now would it be endured that a Church court of the establishment should be allowed to plead the right to set the statute at defiance—could keep the man out of the office to which the heritors had elected him, and actually plead that, however clear the duty imposed on them by the Act of Parliament, they, as a Church court, could not be compelled to perform it, by the ordinary process of declarator?

Once admit this plea, and an established Church would then become an utter nuisance. Subordination in the different departments of the State would be at an end. I say of the State, for what is an established Church but a branch of the institutions of the State; and if a statute is passed imposing duties on any of the institutions of the State, of what consequence is it to be told that the body which sets the statute at defiance is an ecclesiastical body? The jurisdiction of the civil court is to enforce all the statutes of the Legislature, and the ecclesiastical courts, are the creatures of the Legislature, as much as any other tribunals.

But the Church of Scotland is prepared to go fearful lengths in the present day in its pretensions, for my friend the Procurator

went further than claiming independence for the ecclesiastical courts.

The clause in the Act 1592 may be admitted, he said, to be a clear and acknowledged obligation, still, if the presbyteries disregard the statute, and refuse to act, the *character* of *minister* belonging to the *individuals*, he openly maintained, rendered them not amenable to the civil power.

Here again is a pretension of the Church of Rome of a most alarming character. The plea is:—Be the construction of the statute ever so clear, the violation of civil right ever so great, you cannot declare civil rights; you cannot give redress: you cannot ordain the presbytery to execute their office; they may set you at defiance, for the *individuals* composing the Church Court are *ecclesiastical persons*, are *ministers*, and the members of that Church, cannot be subjected to the diligence of the law, for error or wrong done in their character as churchmen. We are advancing, my Lords, with rapid strides, indeed, to the assumption of power, and in the most noxious of all forms, when it arrogates to individuals, in respect of their ecclesiastical profession, exemption from civil jurisdiction. Where is the warrant for this exemption from the civil power? Is there a single expression in any Scotch statute which countenances this plea? The execution of the office or duty, and the review or alteration of the judgment which may be pronounced, if the duty is entered upon, are two different things. The presbytery may err, or they may wilfully reject, after trial, a qualified man. But I admit that their judgment, the civil power must take as conclusive (if it proceeds on a legal objection,) to all effects, although there may be no doubt that indirectly they have committed gross injustice: That lies between them and their conscience: But the presbytery are bound to ACT.

I shall afterwards speak of the attempt to frighten the Court by the supposition, not very decently made, of contumacy on the part of the presbytery, even if your Lordships shall find your jurisdiction sufficient to reach this case. But I apprehend it to be beyond doubt that the Legislature clearly held that they had full power to impose this obligation, and that they looked to this provision as a security for the free exercise of the patron's right of nomination. And certainly, my Lords, the Legislature were well entitled to assume,—without reference to their own power,—that the Church fully acknowledged the authority of the civil Court or the magistrate (as the civil power is called in the Book of Discipline,) to *enforce* the obligations imposed on the Church Courts, and to *compel* them to enter upon and to act in the functions and the duties imposed on them:—For in the Second Book of Discipline, (p. 111 of Mr Peterkin's 1st vol.) you will find the Church thus expounded the relative position and powers of the civil and ecclesiastical bodies as to this very point, and the jurisdiction com-

petent to the civil power, for the purpose of enforcing due performance by the ecclesiastical bodies of their proper duties.—

“ 10. The civill power sould *command* the spiritual to *exercise* and *doe their office according to the word* of God: The spiritual *rewlaris* sould *requyre* the Christian magistrate to minister justice and punish vyce, and to maintaine the libertie and quietness of the Kirk within their boundis.”

Thus, then, we have the establishment of the Presbyterian Church completed, in which the right of nomination or presentation, previously existing in patrons, was not only preserved, but due provision anxiously made for its free exercise, as the mode (in the Polity adopted by the State,) in which they held that the appointment to the office of ministers of parishes ought in future to be made.

It is now contended that, whatever be the construction of this statute, there exists within the Church itself (so established) a power, or at least laws and usages, which entitled them to regulate this matter differently, and which gives a right to congregations, though not named in the statute, to reject the patron's presentee,—to prevent the presbytery taking him on trial, and to exclude the Church court from entering on its functions.

This is a singular plea,—and the danger of dealing in generalities in such a case is such, that I own I watched anxiously to see if my friend would put his proposition into any precise form or shape, in which it could be caught for the purpose of examination. But your Lordships are entitled to understand what the plea exactly is.

1. If the construction of the statute I contend for is correct,—if the right of the patron is such as I have stated as to the selection of the presentee,—if the obligation on the presbytery to receive and admit any qualified presentee is such as I have maintained, then, on that supposition, the power contended for in the Church, whether by new legislation or by inferences and deductions from floating opinions and loose doctrines, at times promulgated by themselves, must be to *ALTER the matter provided for specially* by statute, and a matter *affecting a civil right*, which is secured by the express provision of that statute. If the view I have submitted of the statute is right, such must be the plea of the defenders.

2. The power may be claimed, however, only on the supposition, that the view of the statute which I have submitted is not well founded. At this moment, I think the Court have not the plea before them in an intelligible form. But on that supposition, the plea must be admitted to be wholly unavailing, if I am right in the view of the statute which I have now pressed on the Court. And, then, equally on this supposition, the power claimed is to *affect a civil right*, to impair its value and to deny effect

to its exercise, and that too in a way not provided for or contemplated by statute.

On the first supposition, it seems to me to be incontestible, that the power claimed cannot be admitted by the civil court *against* the statute. On the second supposition,—assuming that I have not made out my case on the statute as imperative on the presbytery, yet, as this veto is not introduced by the statute, and as the right *affected* by it is admitted to be a civil right, the power claimed can be admitted and justified only by proving that the authority conceded to the Church goes the length of *affecting* civil rights: goes *that* length, observe.—For it will not be sufficient, in order to defend the power claimed, merely to say that the Church possesses legislative authority of a very high character, and of very extensive application. It will be necessary to go a great deal further, to show that that legislative authority of the Church can *affect* a civil right,—can be exercised in such a way as directly to alter the nature and value of civil rights, not derived from the Church at all: And in proving that the legislative power of the Church is of such a character, it is plainly necessary to show that it was *conferred* to *that* extent by the State. No legislative authority for ecclesiastical purposes implies or sanctions the power to *affect* civil rights. There is no implication to this effect in the grant of legislative power for ecclesiastical purposes, and here, then, the Church must be able to plead the authority of statute.

Your Lordships will not fail to perceive the great importance of ascertaining accurately the *extent* and *character* of the power which is claimed for the Church, whether in respect of an inherent right to legislate, or in respect of established principles or usages within the Establishment itself.

In the review through which I am carrying your Lordships of the history of the Church, I think it will most clearly appear that the Church has no such power, and cannot appeal to any principles recognized and acted upon even by itself in support of the measure under consideration.

When the Church came to make practical regulations for the working of the ecclesiastical system established by the act 1592, there was certainly an occasion, when it was both necessary and fitting, to assert and to act upon any *principles* or *views* as to the settlement of ministers, which they believed still to be competent, notwithstanding the provisions of that statute. Indeed, it was then necessary to give effect to, and declare the rights and control of, the congregation over the appointment of ministers by patrons, *if* such control was understood to be acknowledged by the statute, or to be inherent in the Church. The views of the clergy had not changed, and no one can doubt that they would have gladly and strenuously asserted such control, if it had

been within their power. Soon after the act 1592, the Assembly had occasion to deplore the manner in which the right of patronage had been exercised, the manner in which most unfit persons had been thrust into parishes, and the evils to the Church thence arising. In order to check these evils, they proceeded to lay down regulations in 1596 as to the admission of ministers; and there cannot be a stronger proof of the *acknowledgment* by the Church of the *effect* and *meaning* of the act 1592,—of the impossibility of giving effect to the doctrines in the Second Book of Discipline, consistently with the conditions on which by that act the National Church had been adopted by the State, and of the limits within which the powers and authority of the Church were restrained and confined,—than will be found in these regulations. I refer to the Act of Assembly 1596, March 26. You will find it engrossed in an Act of Assembly 1638, the first of the printed acts, in the following terms:

“Corruptions in the Office.—For as much as by the too sudden admission and light tryall of persons to the ministrie, it cometh to passe that many scandals fall out in the persons of ministers: it would be ordained in time comming, that more diligent *inquisition* and *tryall* be used of all such persons as shall enter into the ministrie.

“As specially these points. That the intrant shall be posed upon his conscience, before the great God, (and that in most grave manner,) what moveth him to accept the office and charge of the ministrie upon him.

“That it be inquired, if any by solistation, or moyen, directly or indirectly, prease to enter in the said office: And if it bee found that the solister be repelled, and that the presbyterie repell all such of their number from voting in the election or admission as shall bee found moyeners for the soliciter, and posed upon their conscience, to declare the truth to that effect.

“Thirdly, because by presentations, many forcibly are thrust into the ministrie, and upon congregations, that utter thereafter that they were not called by God: It would bee provided that none seeke presentations to benefices without advice of the presbyterie within the bounds whereof the benefice is; and if any doe in the contrarie, they to be repelled as *rei ambitus*.

“That the tryall of persons to be admitted to the ministrie hereafter, consist not only in their learning and abilitie to preach, but also in conscience, and feeling, and spiritual wisdom, and namely, in the knowledge of the bounds of their calling, in doctrine, discipline, and wisdom, to behave himselfe accordingly with the diverse ranks of persons within his flock, as namely, with atheists, rebellious, weak consciences, and such other, wherein the pastorall charge is most kythed; and that he be meet to stop the mouthes of the adversaries;

“and such as are not qualified in these points to be delayed to further tryall, and while they be found qualified. And because men may be found meet for some places who are not meet for other, it would be considered, that the principall places of the realme be provided by men of most worthie gifts, wisdom, and experience, and that none take the charge of greater number of people nor they are able to discharge: And the Assembly to take order herewith, and the act of the provinciall of Louthain made at Linlithgow, to be urged,” &c.

You will observe, that, in this act of Assembly, the evils arising from the improper exercise of patronage are loudly complained of, and especially the appointment of ministers obnoxious to congregations. Yet the remedy adopted is not by asserting any right of Rejection on the part of the people, any control over the patron's choice, or even of the necessity of *assent* or *concurrence* by a *Call* on the part of the people, as *necessary* to the appointment to the office of the ministry. They consider that the evil lies in persons too lightly and hastily and unworthily taking upon themselves that sacred character, who have no proper call or motive for so doing, but are merely ambitious of preferment: and hence the Church, very properly—clearly within its proper province—in the correct exercise of the power of examination, directs (there being then no system for training and teaching students for the Church, or licensing them as probationers or preachers,) that those intending to come forward for the ministry, and trying to obtain presentations, shall first communicate with the presbytery of the bounds, that the motives and views with which they seek admission into the Church may be judged of, and the purity and sincerity of their purpose duly and timeously considered. Is it possible to suppose that the right of the people to *reject* the persons, so thrust upon them, would not on this occasion have been asserted by the authors of the Second Book of Discipline—who had struggled so long and zealously for its adoption—if the Church had imagined that the maintenance of the principles therein asserted could competently be asserted, after the establishment was framed on the conditions of the Act 1592. This Act of Assembly, however, is also very important in another point of view. It will be observed, that it contains no trace of the *form* or *necessity* of a *call* to a *Presentee*, as an occasion of enabling the people to express their willingness that he shall be their pastor. That in cases when the right of patronage was not acted upon, but as often happened, the Church was left to fill the vacant parish, there might be a *call* by the Church itself, or by the elders and others, resorted to, as a mode in *that* case of making the appointment, may be true. But there is no trace, at this date, of any *call* to a *patron's* presentee—and it is very remarkable, that the Act of Assembly to which

I have now referred, does not indicate any form, or practice, or views, in the Church, tending even to countenance the Call, as any part of the procedure in the appointment of ministers.

So matters stood until Episcopacy was again established, and again abolished. And nothing occurs worthy of attention until the period of the Covenant in 1638. I own that I cannot believe that much weight could be attached either to any declarations of principles, or to any forms introduced at that period by the Church, which were not regularly adopted and sanctioned by Parliament at the time of the final establishment of Presbytery at the Revolution. The excitement in 1638, and the subsequent part of the reign of Charles I. was very great. The Church exercised most of the powers of the State—legislative and executive. It abrogated acts of Parliament, regulated in short everything, and assumed the whole powers of the Supreme Legislative Council of the nation.

It seems to me to be quite idle, to pick out of the Acts of Assembly at that period, one short sentence announcing an abstract principle, and on that to pretend, after the lapse of two centuries, that it can be reasonably held that a right of peremptory rejection of presentees belongs to the congregation or people. But at least the Acts of Assembly in the year 1638, on which my friend seems to found so much, will be found to be valuable in proving two points; *1st*, That the Declaration or the Reassertion of the Doctrine of the Second Book of Discipline, as to the will of the congregation, was brought forward in 1638, as a proposition which had never previously received effect; and, *2. That* there existed no machinery, form, or mode in which, in practice, that principle could ever have been brought into operation. In truth, it will be found that the Assembly simply reasserted the abstract doctrine in the Second Book of Discipline, and did no more.

In that year, 1638, the Assembly were desirous of revising the system of Presbyterian polity, which had been so long laid aside, and of suggesting many alterations and additions, and they drew up a sort of general scheme for this purpose. They first proceeded at once to adopt the whole of the Second Book of Discipline, by the Act 17th December of that year. Then a few days afterwards, they proceeded to consider and approve of a Report of a Committee, “appointed for considering what constitutions were “to be revised *or* made of new,”—which Committee proposed various articles, which are set down in order, and the deliverance of the Assembly, is appended to each. Many of these proposals are simply the renewal of old regulations, and acts of the original assemblies. Others are general points for the adoption of the Church. Among the latter, is an overture or proposal—the 20th—in the following terms: “20, anent the presenting either of

“pastors or readers, and schoolmasters to particular congregations, that there be a respect had to the congregation, and that no person be intruded in any office of the Kirk contrary to the will of the congregation to which they are appointed.” The Assembly “allowed this article.” If you will read over the Act of Assembly, you will be satisfied that this is proposed as a new article or proposition, and that there had not been found among all the old regulations, which this committee raked up and brought forward for reinactment, a single regulation calculated, or intended, or professing, to carry this principle into operation.

As to the precise meaning attached by the Church itself, to the expressions employed in this article, in the proposals of the General Assembly in 1638, I do not think that I have much interest to inquire,—for it is neither proved that this proposal was at any time adopted by the State, nor even adhered to by the Church. But Mr Bell assumed it to be a clear point, that the expression, “contrary to the *will*” of the people, did not mean contrary to reasonable and well founded objections stated for the judgment and opinion of the presbytery,—that, even at that period, the Church courts admitted that the wish of the people ought to prevail against their opinion and authority; and he concluded that it was most gross interpolation,—a limitation of the principle so asserted, equally against common sense and fair construction,—to read or explain, “contrary to the will of the congregation,” as if it ran,—against cause shown or good objections stated by the congregation. Indeed! Let us see how the Church itself, when it came to carry into effect this abstract principle, viewed the matter and expounded this general principle. In 1638, they were merely attempting to revise the Presbyterian polity, and to purge it of the corruptions and impurities which the institution and jurisdiction of bishops had introduced. Soon after, as we all know, began the discussions among the divines convened at Westminster, for the purpose of settling and adjusting the form of Church polity for Presbytery; and it is very material to see how the Assembly of divines, (guided, as we all know, chiefly on these points by the ministers from Scotland,) explained this general principle as to the rights and privileges of the people, and the manner in which it was practically intended and directed to act. The well known Form of Church government so drawn up was instantly adopted by the General Assembly in the same year 1645, and engrossed in its acts.

Indeed I am very anxious, to call your attention earnestly to this Form or exposition of Church government in 1645, so adopted and promulgated by the General Assembly. You will find that experience had modified greatly the views propounded in the Second Book of Discipline. The able men then conducting the deli-

berations, and fighting the battles of the Church, were men of great practical experience,—of sounder judgment and more general talents, than the framers of the Second Book of Discipline, and they had full time to reflect on the soundness or unsoundness of the exalted and fanatical views embodied in that singular composition. On many points, I do not say on all, they took safer ground, and it is very remarkable that the very important matter of the appointment to the pastoral office was one of the questions on which they adopted very different views, and they limited, by practical regulations within very narrow and safe bounds, the general pretensions which had been propounded in the Second Book of Discipline. The form of Church government 1645 is also very methodically framed. For the sake of accuracy, let me say this Form of Church government to which I refer is not the Directory 1645 for Worship. My edition is printed 1755.

It treats of the *ordination* of ministers,—of the *doctrine* of ordination and the *power* of ordination. This matter is claimed as spiritual or doctrinal: But the *nomination* of ministers is not stated as a point of *doctrine*, or as *spiritual* and *therefore* belonging to the Church.

“Of Ordination of Ministers.—Under the head of ordination of ministers is to be considered, either the doctrine of ordination, or the power of it.”

“Touching the doctrine of Ordination.—No man ought to take upon him the office of a minister of the word without a lawful calling.

“Ordination is always to be continued in the Church.

“Ordination is the solemn setting apart of a person to some public Church office.

“Every minister of the word is to be ordained by imposition of hands, and prayer, with fasting, by those preaching presbyters to whom it doth belong.

“It is agreeable to the word of God, and very expedient, that such as are to be ordained ministers, be designed to some particular Church, or other ministerial charge.

“He that is to be ordained minister, must be duly qualified both for life and ministerial abilities, according to the rules of the Apostle.

“He is to be examined and approved by those by whom he is to be ordained.

“No man is to be ordained a minister for a particular congregation, if *they of that congregation can show just cause of exception against him.*” Observe the remarkable words.

Then the *power* of ordination is claimed for the Church courts, in opposition to the notions then broached as to the rights of each separate congregation to *ordain* ministers for themselves, and directions are given for the *form* of ordination.

Here then you have the Church explaining what they practically understood by the general phrase, "contrary to the will of the congregation," on the first occasion when they had to make any regulation on the subject,—and you see it is brought to the very construction which Mr Bell so vehemently reprobates, as contrary to principle and common sense, viz. that the people are to *state just cause of exception* against him,—that is, that the matter is to be stated to, and judged of, and determined by, the presbytery, as regular matter of objection, on which it is their province, in the exercise of the power of collation, to decide. On this point, then, as to the meaning of the principle asserted by the Assembly in 1638, whether it be a point of interpretation of the words employed, or of Presbyterian doctrine, I leave my friend, the Procurator, to settle the matter with the Assembly of Divines at Westminster. I suspect that even he would find them rather awkward customers in a contest as to Church law. Even in this Form of Church government, drawn up at a period when the views of the Church went so much further than the Legislature in 1690, (when it finally established the Church of Scotland,) you do not find, as a matter of doctrine, the *assent* or *concurrence* of the people stated as *essential* to constitute the pastoral relation, and as a warrant for the ordination to the office. I mention this as very material, with reference to the authority and legal effect of a Call, to which I shall afterwards advert.

The Church at that time, however, wished to have patronage abolished,—smarting, as they did, under the effects of settlements, by the Court and other patrons, of persons very ill affected to the independence of the Church. An Act of Parliament was obtained to that effect in 1649. I am really at a loss exactly to know what use my friend makes of this *rescinded* Act of Parliament, and of the Act of Assembly which followed on it. We have heard the terms of the Act of Assembly founded upon *in aid*, how I do not exactly know, of the present views of the Church, and in support of the powers claimed by the Church. Is either the Act of Parliament, or the Act of Assembly in force? The *former* is rescinded. Patronage exists, and is secured by law. The *latter* is an act passed in virtue of the authority specially committed to the General Assembly to carry into effect this Act of Parliament. Is that Act of Assembly now in force? Is it part of the law of the land or of the Church? If so, then there ought to be no patronage, for it regulates the settlement of ministers in the case of patronage being abolished. "Oh—it contains the principles and views of the Church." Yes, as to that altered and different state of the law. It contains regulations as to what is to happen *on the abolition* of patronage. But how are these applicable to, or authoritative in the case of patronage being restored. They are all utterly inapplicable. Again,—"*Views*

“and *principles* of the Church,”—what effect can this Act of Assembly (taking this loose and general and vague expression) have, in proving any law of the Church to be recognized or in observance, as to the rights of the people, in *competition* with, or as a *control* over, patronage. Of course, if patronage is abolished, and the right of election is vested in the people, why, it is plain that, of necessity, the rights of the people must be infinitely different from what they were before, whether the Church approved of the change or not. Then of what avail to quote an Act of Assembly regulating the settlement of ministers *after* patronage was *abolished*, and when the congregation got by statute the *right of election*, as of the least application to the present case, or as affording the slightest warrant for the views taken up by the Assembly in 1834?

But since the defenders found so much on this act of Assembly 1649, I must call your attention to it, in order to point out the principles held by the Church respecting the doctrine of collation, even when patronage was abolished,—respecting the authority and jurisdiction they asserted for the church courts even in that state of things, and the singular contrast it exhibits to the manner in which the Assembly, in 1834, were found to be ready to surrender that jurisdiction, and to give up the most important points in the doctrine of collation.

The rescinded act 1649 proceeds,—“The estates of Parliament being sensible of the great obligation that layes upon them by the Nationall Covenant, and by the Solemn League and Covenant, and by many deliverances and mercies from God, and by the late solemn engagement unto duties, to preserve the doctrine, and maintain and vindicate the liberties of the Kirk of Scotland, and to advance the work of Reformation therein to the utmost of their power; and considering that patronages and presentations of kirks is an evill and bondage under which the Lord’s people and ministers of this land have long groaned, and that it hath no warrant in God’s word, but is founded onely on the common law, and is a custome Popish, and brought into the Kirk in time of ignorance and superstition, and that the same is contrary to the Second Book of Discipline, in which, upon the solid and good ground, it is reckoned among abuses that are desired to be reformed, and unto severall acts of Generall Assembly, and that it is prejudicial to the liberty of the people and planting of kirks, and unto the free calling and entrie of ministers unto their charge. And the said estates being willing and desirous to promote and advance the Reformation foresaid, that every thing in the house of God may be ordered according to his word and commandment, doe therefore, from the sense of the former obligations, and upon the former grounds and reasons, discharge for ever hereafter

“ all patronages and presentations of kirks, whether belonging
 “ to the King or to any laick patrone, presbyteries, or others
 “ within this kingdome, as being unlawfull and unwarrantable by
 “ God’s word, and contrary to the doctrine and liberties of this
 “ Kirk ; and doe repeal, rescind, make voyd, and annull all gifts
 “ and rights granted thereanent, and all former acts made in
 “ Parliament,” &c.

Then “ it is farther declared and ordained, that if any pre-
 “ sentation shall hereafter be given, procured, or received, that
 “ the same is null and of no effect, and that it is lawfull for pres-
 “ byteries to reject the same, and to refuse to admit any to trialls
 “ thereupon, and, notwithstanding thereof, to proceed to the
 “ planting of the kirk upon the sute and calling, or with the
 “ consent of the congregation, on whom none is to be obruded
 “ against their will. And it is decerned statute and ordained,
 “ that whosoever hereafter shall, upon the suit and calling of
 “ the congregation, after due examination of their literature and
 “ conversation, be admitted by the presbytery unto the exercise
 “ and function of the ministry in any paroch within this kingdom,
 “ that the said person or persons, without a presentation by
 “ virtue of their admission, hath sufficient right and title to pos-
 “ sesse and enjoy the manse and gleib, and the whole rents, pro-
 “ fits, and stipends,” &c.

“ And because it is needful that the just and proper interest
 “ of congregations and presbyteries, in providing of kirks with
 “ ministers, be clearly determined by the Generall Assembly,
 “ and what is to be accompted, the congregation having that in-
 “ terest : Therefore it is hereby *seriously recommended* unto the
 “ next Generall Assembly *clearly to determine the same*, and to
 “ *condescend upon a certain standing way for being a settled*
 “ *rule therein for all time coming*,” &c.

The *Assembly* proceeded under this authority to regulate the
 settlement of ministers on the footing, and under the provisions
 of this statute. The Act of Assembly is in these terms.—

“ Directorie for Election of Ministers. 1. When any place
 “ of the ministrie in a congregation is vacant, it is incumbent to
 “ the presbyterie with all diligence to send one of their number
 “ to preach to that congregation, who in his doctrine is to repre-
 “ sent to them the necessitie of providing the place with a quali-
 “ fied pastor, and to exhort them to fervent prayer and suppli-
 “ cation to the Lord, that he would send them a pastor according
 “ to his own heart : As also he is to signifie, that the presbyterie,
 “ out of their care of that flock, will send unto them preachers
 “ whom they may hear, and if they have a desire to hear any
 “ other, they will endeavour to procure them an hearing of that
 “ person or persones upon the sute of the elders to the presbyterie.

“ 2. Within some competent time thereafter, the presbyterie is

“ again to send one or more of their number to the said vacant congregation, on a certain day appoynted before for that effect, who are to conveen and hear sermon the foresaid day, which being ended, and intimation being made by the minister, that they are to goe about the election of a pastor for that congregation, the session of the congregation shall meet and proceed to the election, the action being moderated by him that preached : And if the people shall, upon the intimation of the person agreed upon by the session, acquiesce and consent to the said person, then, the matter being reported to the presbyterie by commissioners sent from the session, they are to proceed to the triall of the person thus elected, and, finding him qualified, to admit him to the ministry in the said congregation.

“ 3. But if it happen that the major part of the congregation dissent from the person agreed upon by the session, in that case the matter shall be brought unto the presbyterie, who shall judge of the same ; and if they doe not find their dissent to be grounded on causelesse prejudices, they are to appoynt a new election in manner above specified.

“ 4. But if a lesser party of the session or congregation show their dissent from the election without exceptions, relevant and veriefied to the presbyterie, notwithstanding thereof the presbyterie shall go on to the trials and ordination of the person elected ; yet all possible diligence and tendernesse must be used to bring all parties to an harmonious agreement.

“ 5. It is to be understood that no person under the censure of the Kirk because of any scandalous offence, is to be admitted to have hand in the election of a minister.

“ 6. Where the congregation is disaffected and malignant, in that case the presbyterie is to provide them with a minister.”

In the view I take of this subject, this act of Assembly makes greatly against the pretension now advanced by the Church, and is of much historical importance, as illustrating the principles of Presbytery as to the jurisdiction of the Church Courts in all matters of collation ; of *historical* value, I say, for really to quote it as now in observance, or as applicable to the present state of the law, seems to me to be ludicrous. Your Lordships will not fail to notice the very remarkable fact, that while the Act of Parliament declared that the election should proceed on the *suit* and *calling* of the congregation, the Assembly, so far from holding that there could be any right or privilege, *even under this statute*, against the Church Courts on the part of the congregation, direct that the session shall propose a person to the congregation ; and then the people are not capriciously and arbitrarily and peremptorily to reject the person so proposed, though not named by themselves, (with whom it might be thought that, under the statute, the whole matter lay ;)—the presbytery are to judge between the session and

the congregation, if the major part of the latter object to the person so proposed, seeing that the objection relates to the fitness and qualities of a minister, of which the presbytery were the proper judges:—And if it shall be found by the presbytery—after inquiry of course—after deliberation, on hearing parties,—if it shall be found by the Church Court,—by the proper tribunal, from whom no such matter could be withdrawn,—that the opposition to the person proposed arises from *causeless prejudices*, the same are to be disregarded, (even in this system of popular election,)—the people must give way,—*they* are not to act against the opinion and judgment of the Church Courts from caprice or prejudice;—*They* owe deference and submission to the judgment of the presbytery confirming the choice of the session:—Else confusion and insubordination,—an inversion of the due and relative state of teachers and hearers in the Church of God,—would immediately ensue.

Nay, if the congregation are disaffected and malignant,—and we know how wide and vague the application of such terms at that day,—the presbytery are to provide a minister for the flock, whom the presbytery did not think fit to be entrusted with the appointment to the parish.

Surely this Act of Assembly gives us instructive lessons, as to the *authority* and *extent* of the *jurisdiction* respecting the qualities of ministers, as opposed to any arbitrary will of the people, which is implied in the power of Collation, and valuable evidence as to the novelty in the Church of Scotland, of this strange doctrine respecting the SUPREMACY of the *will* of the people,—Will,—without reasons stated, without the power of inquiry or the privilege of opinion by the presbytery,—arbitrary, peremptory, rejection as matter of right, whether from causeless or malicious prejudice.

Mr Bell, founding on the terms employed in this Act of Assembly, as if they proved what is the law now, when patronage exists—or as if this Act of Assembly, passed under the authority of Parliament, aided him in maintaining that, *without the authority* of Parliament, the Church could now do the same thing by the legislative authority, even though patronage is not abolished,—actually takes the *words* as the *measure of the powers* of the Assembly, and of the *rights of the people*, in the present day. He seems to think, that the question is to turn solely on the *meaning* of this act of Assembly—and giving that turn to the case, is full of indignation against the construction, that the dissent thus brought before the presbytery, who are to judge of the matter, *implied any statement of reasons* by the parties objecting, or that such could be required under the plain meaning of the terms employed. I care very little for the correct construction of this Act of Assembly. It is admitted that the Assembly had the power of *judging* in the matter—that the *jurisdiction* of the Church courts was not *excluded* or *surrendered*, in consequence

of the objection by the major part of the congregation—and that the presbytery were entitled to disregard the opposition, if in their opinion the fruit of causeless prejudice. This is enough for the only use which can be made of this Act of Assembly. If it were now the law of the Church and of the land—if it were in force or applicable—if it were the *measure* of the *powers* of the Church, or of the rights of the people, it is only in such case that the precise construction of the terms can be of the slightest importance.

But I am not a little amused to hear Mr Bell tell us that it is an abuse of interpretation,—“ a violent straining of the terms,”—to construe this regulation as countenancing the notion that the people were obliged to *assign* any *reasons* for their opposition. Indeed!! Let us hear what Sir Henry Moncreiff says; p. 34. “ By the directory for the election of ministers of 1649, if a majority of the congregation dissented they were to give *their reasons*, of which the presbytery were to judge. If the presbytery should find their dissent founded on *causeless prejudices* they were, notwithstanding, to proceed to the settlement of the person elected. And there is a clause subjoined which in those times would apply to many cases. ‘ That where the congregation *was disaffected or malignant*, in that case the presbytery were (*by their own authority*) to provide the parish with a minister.’ Though this mode seemed to give weight to the clergy only in the first nomination, or on extraordinary emergencies, and more influence to the people in ordinary cases, it is evident that the clergy had still the chief influence in the ultimate decision, as well as in the selection of the candidates. For when the people were divided, which very generally happened, it lay with the Church courts at last to determine between the parties; and it can scarcely be supposed, with all the purity which can be ascribed to the intentions of the clergy, that the candidate who had most favour among them was often rejected.”

In truth, all theologians have taken the same view as this eminent and great authority. But Mr Bell fell into a curious blunder here from mistaking the footing on which this Act of Assembly proceeded. He says, why—if reasons are to be assigned when the *majority* are to dissent, that is the very same thing which is to take place if the minority dissent, and wherefore then allude to the fact of *majority* or *minority*, since the result is then to depend on the validity of the reasons, not on the fact whether they are stated by majority or minority. Not at all. My friend equally forgets the Act of Parliament, and mistakes the Act of Assembly. The election was to be on the *suit* of the congregation. The Assembly went pretty far, as it was, by attempting to control and regulate and direct the *choice* of the congregation. But they could

not pretend to deny effect to the Act of Parliament, or to dispute the great and necessary effect of opposition by the majority under this statute, to the person proposed to them. They said, that opposition shall not be unreasonable—the fruit of causeless prejudice: You must assign your objections—these the Church court the presbytery is entitled to know—these as a flock of the Church you are bound to state:—if they are plainly unreasonable, you must give way to the pastors under whose spiritual guidance and care you are—the presbytery can judge for you. But then, though the objections might not form matter of accusation, yet if they were fair reasonable grounds of objection or dislike,—whether sufficient for a minority to urge as a bar to the settlement, and as a ground for accusation against the person proposed,—they might be quite enough *under this statute* for a majority to plead, and so the presbytery were to give effect to any fair grounds of objection by the majority, not the result of causeless prejudice—Else the statute vesting the appointment in the suit of the congregation would, in truth, have been practically defeated. This is the distinction between the case of a majority and minority under this Act of Assembly, (which puzzled my friend so much,) although from both, an explanation was required of their reasons or grounds of objection.

I would wish before leaving this Act of Assembly, to hear with more accuracy and precision of statement, than we were favoured with, what is the practical use my friends would make of this act of Assembly. Do they quote it as proof of the legislative power inherent in, and belonging to, the Church? The example is an infelicitous one, for this Act of Assembly was passed, in consequence, and in virtue of the special authority given to the Church, by the statute of the same year, to regulate this matter. Or, as a proof of the subjects falling within the province and jurisdiction of the Church? Equally the special authority bestowed by express statute precludes any effectual appeal to this measure, as a precedent of the smallest weight. Well then, what do they mean to say? Do they actually contend, that because, when patronage was abolished by statute, and a statute gave express and special power to the Assembly, to regulate the mode of settlement, among those on whom Parliament bestowed the choice of ministers, the Assembly may now, when patronage is secured by statute, and no authority given by Parliament to regulate the matter, do the very same thing which two centuries ago, in such an altered state of things, they received special power to regulate. Why that is absurd. Then I ask—I wish to understand—the Court are entitled to know—for what purpose is this Act of Assembly founded upon, in so far as respects the question of the legislative power of the Church? As

yet, I am sure the application of the act has not be pointed out. All that it proves is this,—that when the Assembly did legislate in that year, they had express warrant and authority from the Legislature to do what they professed. Then is it quoted and founded upon, in proof of the existing or inherent *rights* of the *congregation*—as evidence of the control the people by law possess in point of principle, (although never enjoyed) over the selection by patrons, and of the competency of admitting and giving effect to that control? If for such purpose,—the Act of Assembly is equally useless as authority. For the rights or privileges admitted by this Act of Assembly on the part of the congregation are not in a question *with* or as *against* patrons at all, but expressly in the case of the power of appointment being given by statute to the congregation itself. The act proves nothing whatever as to the rights of the congregation, in competition with the civil right of patronage. It proves no right of control, even in the opinions of the Church at that date, over the selection by patrons. For the church had neither to consider nor to regulate such a case at all. It does not even amount to any assertion or recognition of any such abstract principle, as then held by the Church in point of doctrine. It does not prove any claim by the Church of the competency of establishing any such control, or of the previous existence of any regulations which gave effect to such a control. I must own, my Lords, that if I have failed to satisfy the Court that this Act of Assembly, and the statute on which it proceeded, have no sort of application to the present question, it is because I have not been able to ascertain or collect what *is the use*, which the defenders really make in argument of them, or in what way they can bear at all on the case. Indeed, when you combine the statute 1649, and the relative Act of Assembly, with the terms of the Act of Assembly 1645, (containing the form of church government drawn up at Westminster,) I think it is difficult to meet the conclusion, that whatever views were maintained by the Church as to the *expediency* of getting rid of patronage, and vesting the *nomination* in the people, yet no principle or practical law was known to exist, by which the right of patronage was subjected to so complete a control as an arbitrary rejection by the congregation, or that any such right was practically admitted by the Church, to belong to the congregation, consistently with the jurisdiction of the Church Courts, and the submission the people owed to them.

Your Lordships are well aware for how short a time the Church enjoyed the independence which they had obtained in 1649. The Restoration, again, brought neither peace nor liberty to the Church of Scotland; and the thirty years which followed, one gladly passes over as the blackest page in the history of the House of Stuart,—years of tyranny and barbarous persecution,

leaving, however, a precious result in the deep-rooted feeling of attachment to the liberties and independence of the Church, which have since been so remarkable in Scotland, and the strength of which may in truth be said to have created whatever secession has since taken place from its establishment.

I go at once to the Revolution.

One of the first statutes passed in pursuance of the Declaration in the Claim of Rights against the intolerable grievance of Episcopacy, was to settle and secure the Presbyterian Church. The Legislature at the same time adopted the Confession of Faith drawn up at Westminster. The terms of this statute 1690, c. 5, establish every one of the general propositions I have already submitted to the Court, as to the mode and conditions of the establishment of the National Church of Scotland. The act is as follows :

“ Act ratifying the Confession of Faith, and settling Presbyterian Church Government.—Our Sovereign Lord and Lady, the King and Queen’s Majesties, and three estates of Parliament, conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this Church and Kingdom, in the first place to settle and secure therein, the true Protestant religion according to the truth of God’s Word, as it hath of a long time been professed within this land : As also the government of Christ’s Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishing of peace and tranquillity within this realm ; And that by an article of the claim of right, it is declared, That prelacy, and the superiority of any office in the church above presbyters, is, and hath been a great and unsupportable grievance and trouble to this nation, and contrary to the inclinations of the generality of the people ever since the Reformation, they having reformed from popery by presbyters, and therefore ought to be abolished : Likeas, by an act of the last *Session* of this *Parliament*, prelacy is abolished ; Therefore their Majesties, with advice and consent of the said three estates, do hereby revive, ratifie, and perpetually confirm, all laws, statutes and acts of Parliament, made against popery and papists, and for the maintenance and preservation of the true reformed Protestant religion, and for the true Church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likeas, they, by these presents, ratifie and establish the Confession of Faith, now read in their presence ; and voted and approved by them, as the publick and avowed confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches : (which Confession of Faith is subjoynd to this present act.) As also they do establish, ratifie, and con-

“ firm the Presbyterian Church government and discipline ; that
 “ is to say, the government of the Church by kirk sessions, pres-
 “ byteries, provincial synods, and general assemblies, ratified
 “ and established by the 114th act, Ja. 6. Parl. 12, anno 1592,
 “ intituled, *Ratification of the Liberty of the True Kirk, &c.*,
 “ and thereafter received by the general consent of this nation,
 “ to be the only government of Christ’s Church within this king-
 “ dom ; reviving, renewing, and confirming the foresaid act of
 “ Parliament, in the whole heads thereof, *except that* part of it
 “ *relating to patronages, which is hereafter to be taken into con-*
 “ *sideration* : And rescinding, annulling, and making void the
 “ acts of Parliament following.”

Then follows a long enumeration of statutes repealed. The statute continues,—“ with all other acts, laws, statutes, ordi-
 “ nances, and proclamations, and that in so far allanerly as the
 “ said acts, and others generally and particularly above-mention-
 “ ed, are contrary or prejudicial to, inconsistent with, or dero-
 “ gatory from the Protestant religion and Presbyterian govern-
 “ ment now established ; and allowing and declaring that the
 “ Church government be established in the hands of, and exer-
 “ cised by, these Presbyterian ministers who were outed since the
 “ first of January, 1661, for non-conformity to prelacy, or not
 “ complying with the courses of the times ; and are now restor-
 “ ed by the late act of Parliament, and such ministers and elders
 “ only as they have admitted or received, or shall hereafter ad-
 “ mit or receive : And also that all the said Presbyterian minis-
 “ ters have, and shall have, right to the maintenance, rights,
 “ and other privileges by law provided, to the ministers of
 “ Christ’s Church within this kingdom, as they are, or shall be,
 “ legally admitted to particular churches. Likeas, in pursuance
 “ of the premises, their Majesties do hereby appoint the first
 “ meeting of the General Assembly of this Church, as above
 “ established, to be at Edinburgh, the third Thursday of Octo-
 “ ber next to come, in this instant year 1690.”

Then follow some regulations as to the ministers deprived of the churches before 13th April 1689.

At present I need only further remark on this statute, that while the act 1592 is, generally speaking, revived except in the particular relating to patronage, the act 1567, c. 7, is not mentioned at all. And, indeed, very little consideration will show, that except as a general declaration in favour of the Church, it could not be regarded as applicable to the presbyterian government,—more particularly as it was chiefly applicable to patronage. In the course of the same year, the Legislature proceeded to introduce the new system, (as we know so greatly against the personal opinion and cautious sagacity of King William,) which, in the excitement of that day, the clergy had successfully recom-

mended. The plea was, that the heritors and elders should *propose* the minister to the congregation. Mr Bell said it was wholly useless to allude at all to this statute, because it is now repealed. It is repealed. But it is most valuable and instructive, as illustrating what Parliament understood the powers of the Church really to be, in regard to the regulation of matters relating to the appointment of ministers, even when the rights of patrons were annulled.

It is said that the whole matter of the settlement of ministers—of the mode in which their appointment is to receive the assent of the people—is entirely spiritual or ecclesiastical, falling wholly within the province of the Church to regulate, because a part of the Call. Then, if so—if such had been the view taken by the Legislature of the powers of the Church, and if the character of all regulation respecting the appointment of ministers, even by a call at large, had been thought to be wholly ecclesiastical, surely the occasion of this act was the very one, on which it might have been expected, that to the Church would have been left the regulation of the mode, in which the consent or objection of the congregation were to be given to the settlement of the person proposed by the heritors and elders, and the framing of any rules necessary to give effect to the general system which the Legislature proposed to adopt. But was it so? We shall see.

Again,—if the arbitrary and peremptory rejection by the people of any person proposed to be pastor over them was a fundamental principle in the Church of Scotland, as established at the Revolution, on the ground, that if not acceptable, he could not be edifying, and that they should not be subjected to the spiritual care of any pastor contrary to their will—then, surely, here was an occasion,—the very fittest and the most natural,—for acknowledging and giving effect to such a principle. The ancient rights of patrons were to be abolished. The right of proposing was to be bestowed, for the first time, on a new body, who had no private civil rights to plead against the congregation—themselves, perhaps, a numerous body—likely to differ—not likely to be much better judges than the majority of the congregation—themselves a part of that very congregation, and hence, on every ground, here was the occasion and the time when you would expect to find some trace or sanction of this fundamental law, which is said to vest a right of peremptory rejection in the people, (to the exclusion, too, of the jurisdiction in the church courts,) even against the ancient and civil rights of patrons. What was the fact? Let us look to the statute which was passed.

“Act 1690, c. 23. Act concerning Patronages.—Our Sovereign Lord and Lady, the King and Queen’s Majesties, considering, That the power of presenting ministers to vacant churches, of late exercised by patrons, hath been greatly abus-

“ ed, and is inconvenient to be continued in this realm, Do there-
 “ fore, with the advice and consent of the Estates of Parliament,
 “ hereby discharge, cass, annull, and make void the foresaid
 “ power heretofore exercised by any patron of presenting minis-
 “ ters to any kirk now vacant, or that shall hereafter happen to
 “ vaik within this kingdom, with all exercise of the said power :
 “ And also all rights, gifts, and infeftments, acts, statutes, and
 “ customs, in so far as they may be extended, or understood, to
 “ establish the said right of presentation ; but prejudice always,
 “ of such ministers as are duly entered by the foresaid presen-
 “ tations, (while in use,) their right to the manse, glebe, bene-
 “ fice, stipend, and other profits of their respective churches, as
 “ accords : And but prejudice to the patrons of their right to
 “ employ the vacant stipends on pious uses, within the respec-
 “ tive paroches, except where the patron is Popish, in which case
 “ he is to employ the same on pious uses, by the advice and ap-
 “ pointment of the presbytery ; and in case the patron shall fail
 “ in applying the vacant stipend for the uses foresaid, that he
 “ shall lose his right of administration of the vacant stipend for
 “ that and the next vacancy, and the same shall be disposed on
 “ by the presbytery to the uses foresaid ; excepting always the
 “ vacant stipends within the bounds of the synod of Argyle :
 “ And to the effect, *the calling and entering ministers*, in all time
 “ coming, may be *orderly and regularly performed*, their Ma-
 “ jesties, with consent of the Estates of Parliament, *Do statute*
 “ *and declare*, That, in case of the vacancy of any particular
 “ church, and for supplying the same with a minister, the heri-
 “ tors of the said parish, (being Protestants,) and the elders, are
 “ *to name and propose* the person to the *whole congregation*,” (by
 “ the way—no such selection of a portion of the congregation as the
 “ Veto Act makes) “ to be either *approved or disapproved* by them ;
 “ and if they disapprove—That the *disapprovers give in their rea-*
 “ *sons* to the effect the *affair may be cognosced upon by the pres-*
 “ *bytery* of the bounds, at whose judgment, and by whose determi-
 “ nation, the calling and entry of a particular minister is to be
 “ ordered and concluded : And it is hereby enacted, That if ap-
 “ plication be not made by the eldership, and heritors of the pa-
 “ roch, to the presbytery, for the call and choice of a minister
 “ within the space of six months after the vacancy, that then the
 “ presbytery may proceed to provide the said parish, and plant
 “ a minister in the church, *tanquam jure devoluto*. It is always
 “ hereby declared, that this act shall be but prejudice of the
 “ calling of ministers to Royal Burghs by the Magistrates,
 “ Town-council, and Kirk Session of the burgh, where there is
 “ no landward parish, as they have been in use before the year
 “ 1660. And where there is a considerable part of the paroch
 “ in landward, that the call shall be by Magistrates, Town-

“ Council, Kirk-Session, and the heritors of the landward paroch. And in lieu and recompence of the said right of presentation, hereby taken away, their Majesties, with advice and consent foresaid, statute and ordain,” &c.

On the construction and import of this Act of Parliament no doubt is raised. It is not disputed the disapprovers of the person proposed were to assign their reasons as matters proper for the cognizance and decision of the presbytery, and that if their reasons were not valid and sufficient in the opinion of the presbytery, the dissent or objection of the congregation was of no legal force or avail whatever.

It would be repetition, I fear, to point out all the inferences which this enactment so directly points to, in support of the general propositions I am now endeavouring to establish. I should hope that its application to every part of my argument may be at once admitted to me by your Lordships.

This state of things continued to the 10 of Queen Anne. Then the Act 1690, c. 23, is repealed—patronage is restored and confirmed by statute, and now the Church tells us, that the people have a right of rejection, which even on the abolition of patronage the Church itself neither gave nor acknowledged, and that the Church has the power to *bestow* this right as a condition and limitation on the exercise of the civil right, which statute confirmed without such limitation.

Let me first call the attention of the Court to the terms of the 10 Queen Anne, c. 12—A. D. 1711.

“ An Act to restore the Patrons to their ancient rights of presenting Ministers to the Churches vacant in that part of Great Britain called Scotland. Whereas by the antient laws and constitutions of that part of *Great Britain* called *Scotland*, the presenting of ministers to vacant churches did of right belong to the patrons, until by the twenty-third act of the second Session of the first Parliament of the late King William and Queen Mary, held in the year One thousand six hundred and ninety, intituled, *Act concerning Patronages*, the presentation was taken from the patrons, and given to the heritors and elders of the respective parishes; and in place of the right of presentation, the heritors and life-renters of every parish were to pay to the respective patrons a small and inconsiderable sum of money, for which the patrons were to renounce their right of presentation in all times thereafter: And whereas, by the fifteenth act of the fifth Session, and by the thirteenth act of the sixth Session of the first Parliament of the said King William, the one intituled, *An act for encouraging of preachers at vacant churches be-north North*, and the other intituled, *Act in favour of preachers be-north North*; there are several

“ burihens imposed upon vacant stipends, to the prejudice of the
 “ patron’s right of disposing thereof: And whereas that way of
 “ calling ministers has proved inconvenient, and has not only oc-
 “ casioned great heats and divisions among those who by the
 “ aforesaid act were entitled and authorized to call ministers, but
 “ likewise has been a great hardship upon the patrons, whose
 “ predecessors had founded and endowed those churches, and
 “ who have not received payment or satisfaction for their right
 “ of patronage from the aforesaid heritors or life-renters of the
 “ respective parishes, nor have granted renunciations of their
 “ said rights on that account ;” “ be it therefore enacted, by the
 “ Queen’s most excellent Majesty, by and with the advice and
 “ consent of the Lords spiritual and temporal, and Commons, in
 “ this present Parliament assembled, and by the authority of the
 “ same, That the aforesaid act made in the year one thousand
 “ six hundred and ninety, intituled *Act concerning patronages*,
 “ in so far as the same relates to the presentation of ministers by
 “ heritors and others therein mentioned, be and is hereby repeal-
 “ ed and made void ; and that the aforesaid fifteenth Act of the
 “ fifth Session, and thirteenth act of the sixth Session of the first
 “ Parliament of King William, be and are hereby likewise re-
 “ pealed and made void ; and that in all time coming, the right
 “ of all and every patron or patrons to the presentation of minis-
 “ ters to churches and benefices, and the disposing of the vacant
 “ stipends for pious uses within the parish, *be restored, settled, and*
 “ *confirmed* to them, the *aforesaid acts*, or *any other act, statute,*
 “ *or custom* to the contrary in any wise notwithstanding ; and
 “ that from and after the first day of *May*, one thousand seven
 “ hundred and twelve, it shall and may be lawful for her Majes-
 “ ty, her heirs and successors, and for every other person or per-
 “ sons who have right to any patronage or patronages of any
 “ church or churches whatsoever, in that part of *Great Britain*
 “ called *Scotland*, (and who have not made and subscribed a for-
 “ mal renunciation thereof under their hands,) to present a *qua-*
 “ *lified* minister or ministers to any church or churches whereof
 “ they are patrons, which shall, after the said first day of *May*,
 “ happen to be vacant ; and the presbytery of the respective
 “ bounds, *shall, and is hereby obliged to receive and admit* in the
 “ same manner *such qualified* person or persons, minister or mi-
 “ nisters, as shall be presented by the respective patrons, as the
 “ persons or ministers presented before the making of this act
 “ ought to have been admitted.”

Section third “ provides also, and it is hereby enacted by the
 “ authority aforesaid, That in case the patron of any church
 “ aforesaid shall *neglect or refuse* to present any *qualified* minis-
 “ ter to such church that shall be vacant the said first day of
 “ *May*, or shall happen to be vacant at any time thereafter, for

“ the space of six months, after the said first day of *May*, or after
 “ such vacancy shall happen, that the right of presentation shall
 “ accrue and belong for that time to the presbytery of the bounds
 “ where such church is, who are to present a qualified person
 “ for that vacancy *tanquam jure devoluto*.”

Then follow other provisions as to the patronages previously belonging to the archbishops, &c., to the requisite oaths of allegiance, &c. which are immaterial.

To follow out and finish the details of the statutes, I may refer now to the 5 Geo. I. which contains some regulations necessary for securing allegiance to the House of Hanover on the part of the patrons and presentees, without undue obstruction to the settlement of vacant parishes.

The 8th section of 5 Geo. I. c. 29 enacts.—“ And whereas great
 “ obstructions have been made to the planting, supplying, or fill-
 “ ing up of vacant churches in Scotland, with ministers qualified
 “ according to law, patrons presenting persons to churches who
 “ are not qualified by taking the oaths appointed by law, or who,
 “ being settled in other churches, cannot or will not accept of
 “ such presentations. To the end that such inconveniences may
 “ be prevented for the future, Be it enacted by the authority
 “ aforesaid, That if any patron shall present any person to a va-
 “ cant church, from and after the said first day of June, one thou-
 “ sand seven hundred and nineteen, who shall not be qualified
 “ by taking and subscribing the said oath in manner aforesaid,
 “ or shall present a person to any vacancy who is then or shall
 “ be pastor or minister of any other church or parish, or any
 “ person who shall not accept or declare his willingness to accept
 “ of the presentation and charge to which he is presented, with-
 “ in the said time, such presentation shall not be accounted any
 “ interruption of the course of time allowed to the patron for pre-
 “ senting; but the *jus devolutum* shall take place, as if no pre-
 “ sentation had been offered; any law or custom to the contrary
 “ notwithstanding.

“ 9. And be it also further declared and enacted, That no-
 “ thing herein-contained shall prejudice or diminish the right of
 “ the church, as the same now stands by law established, as to
 “ the *trying* of the *qualities* of any person *presented* to any
 “ church or benefice.”

And now I have to advert to the notable discovery of my learned friend, that in the Act of Queen Anne, the statute respecting patrons which is restored and revised, is not the provision in the act 1592, which was excepted in 1690, but the act 1567, cap. 7, or rather (for I really do not very well know the precise shape of the plea, but I think it is,) that one part of the provision respecting patronage in the act 1592 was renewed, but not the astringing or obligatory direction upon presbyteries.

I have already noticed the singularity of the plea which would make out the Act 1567, cap. 7, to be the statute intended to be revived, and not the enactment respecting patronage in the statute 1592, seeing that the former was passed anterior to the institution of presbytery, and is not applicable to presbyterial institutions, and contains no provision for the congregation appealing against a settlement by the Presbytery in face of *good* objection fully proved.

Let me now advert to this plea, that when patronage was restored in 1711, any part of the clause containing the provisions respecting patronage in 1592, could have been omitted or annulled. The obligation upon presbyteries to receive qualified presentees, it will be remembered, is but one part of the provision in 1592. The whole enactment is in the following terms.

“ And therefore ordainis all presentations to benefices, to be direct to the particular presbyteries, in all time cumming: with full power to give collation thereupon; and to put order to all maters and causes ecclesiasticall, within their bounds, according to the discipline of the kirk: providing the foresaids presbyteries be bound and astricted, to receive and admitt quhat-somever qualified minister, presented be his Majesty, or laick patrones.”

Now, when the Legislature in 1711 came to restore patronage they repealed the Act 1690, c. 23, which had superseded this particular provision in the Act 1592, and the course taken then in the Act 1711, is by *general* terms to *restore* the right of patronage. The words are to *restore, settle, and confirm* the right which the act of 1690 had taken away. Well then:—What would be the natural conclusion in such a case:—Why surely that the right of patronage was to be *restored to the extent, and in the terms* of the provision which had originally incorporated it in 1592 into the Presbyterian Church, and made it a condition of the establishment of the Church. The act 1711 does not specify any previous statute. It *restores the previous right*. The acts in 1690 had expressly revived and restored the whole of the statute 1592, (the great charter of presbytery) except the portion as to patronage. Then the statute 1711 restores patronage in general terms, but without notice of any special act of Parliament. My friend did not seem to dispute that this must restore *that* part of the enactment in 1592, which directs the presentations to be *addressed to presbyteries*, and which *gives to presbyteries* the power to give collation thereupon. And if that were not revived, there would have been no obligation on patrons to address their presentations to presbyteries. But then it is gravely contended, and announced with great parade by my learned friend, as a discovery in this deduction of the statutes, leading (however unexpectedly,) to important results, that the *other part* of the same sentence, the obligation upon presbyteries to re-

ceive and admit whatever qualified person the patron might appoint, was not revived, and that you were *necessarily* referred back to the statute 1567, prior to the institution of presbyteries. *Wherefore?* why is the prior statute to be taken in preference to the concluding provision of 1592, the remainder of which is revived? The act 1711 specifies no particular act. It employs the most absolute general terms in favour of patronage; it restores, settles, and confirms the right. *Wherefore*, then, I ask,—Oh, by *implication*, says my learned friend. Singular reasoning. A necessity by *implication* for holding this portion of the enactment respecting patronage to be *omitted*, when the enactment contained in the act 1592 was *otherwise* revived!! Why, this part of the provision was the mode of *securing the right*, and making it practically valuable. Then, on occasion of restoring that right in opposition to the Church, I should have thought the *implication* would be, that the right so *restored* was to be revived *as it previously existed*. Oh no, says my friend, consider my implication. The *object* in 1711 is to *restore, settle, and confirm* a right which it was declared had been injuriously annulled:—and the *implication* is, that in restoring the right to be thus revived and confirmed, the Legislature *must be held* purposely to *omit* the practical provision, which had been devised in order to *secure the free exercise* of the right. The *object* was to *restore and confirm* patronage against, if you please, a hostile Church,—and, *therefore*,—in pursuance of that object, to further that purpose, *therefore*—such is the *implication*—you are to assume that the Legislature deliberately intended to omit the safeguard of the right thus restored, and to omit the provision by which its exercise was to be secured. Such is the implication! Most felicitous instance of the *sufficient reason* in interpretation! I think it was upon this point in his argument that my learned friend, careering in the strength of his own logic, and full of compassionate concern for the embarrassment I was to experience in grappling with so difficult an argument, exclaimed in accents of somewhat dubious encouragement, “We shall be glad to hear what the Dean “of Faculty” (poor young man) “has to say.” This is my answer, and I hope it has relieved my learned friend, from the trembling anxiety for my safety, with which he has seen me approaching that slough, in which I was to be hopelessly engulfed.

But my learned friend seems to have caught rather hastily at the shadow of an argument against the important obligation on presbyteries contained in the statute 1592:—for he has omitted to observe that the first section of the act of Queen Anne actually *repeats* and embodies at length, almost in the express terms of the act 1592, the *same obligation on presbyteries* to receive and admit in the same manner as formerly, such qualified persons as might be presented by patrons. Under what delusion, then, my learned

friend broached this notable discovery, the merit of which is, I believe, wholly his own, that when patronage was restored in 1711, the Legislature must be taken, and that *upon implication* forsooth, to omit that part of the law respecting patronage, which alone secured its free exercise, and which practice had shown to be so necessary, in order to give fair effect to the civil right of patrons, I am rather curious to know,—for the very point is the subject of express enactment in the statute 1711.

Such, then, is the history of the foundation and establishment of the Church of Scotland, and especially of the arrangements and provisions respecting the right of appointment to the pastoral office.

Without consuming much time in recapitulation, and submitting generally that the deduction which I have attempted to make, confirms satisfactorily the legal and historical propositions which I took the liberty of stating to the Court, I may say that some points seem to be indisputably clear.

1. That the right of nomination to the office of minister of parishes, and the effect of that right, have been the subject of repeated statutory enactments when the institutions of the Established Church were under the consideration of the Legislature.

2. That there is no trace of any intention to leave the regulation of these points to the Church itself.

3. That patronage being a civil right, and having thus been expressly provided for by statutory enactment, there can be no implied power in another body to control the operation of these enactments, or affect the civil right which they profess to secure.

4. That there is no trace in the Acts of Parliaments of any legislative power in the Church, so to deal with civil rights and with the statutory provisions respecting the same.

5. That neither the consent by a Call, nor the dissent of the people, is ever alluded to or recognized, in any one statute which *confirms* and *secures patronage*, much as the rights of the people had been advocated by the Church, and notwithstanding the manner in which their interest and privileges were brought forward and admitted when the rights of patrons were *abolished*.

I think, I may now submit with some degree of confidence to the Court the general Propositions, viz. That when *one party* has the right to nominate to the office, and *another* the right and duty to try the qualifications or qualities of the nominee, a right of peremptory rejection in a *third party*, is alike inconsistent with the right of nomination and the duty of examination:—And second, that the largest and most liberal interpretation of a power to *examine* and *admit* the person nominated by an undoubted

patron of an office, whatever it may be, will never entitle the body intrusted with such power of examination to bestow at once upon a third and different party, a right, of their own will, and without reasons, to reject the patron's nominee.

As for the practice or views of the Church, or rather the views broached at times by individuals and parties in the Church after 1711, I cannot think that there is either much relevancy or much weight in the lengthened comments which you have heard upon that subject. It appears to me that a complete answer to the defenders, upon all this part of their case, may be found in the very sound and authoritative statements of Sir Henry Moncreiff, upon the subject, in his *View of the Constitution of the Church of Scotland*. I will run over, and very shortly, the points that require notice on this part of the case.

Sir H. Moncreiff states, what is well known to be historically true, that for a great number of years the statute 1711 had practically little effect. Many of the patrons—many of the great families in Scotland being Papists or Jacobites, would not or could not take the necessary oaths. There was in many other instances a reluctance on the part of patrons to be among the first to call into exercise rights which the Church at that time annually protested against. The Church also, let it be remembered, were somewhat too zealous in stirring up, and somewhat too loose in sustaining, objections to presentees. The Court again were chiefly desirous to secure zealous supporters of the Hanoverian succession, and the more decidedly presbyterian and popular the minister, the more zealous the adherent of the reigning family : And the Government, in the numerous parishes of which the Crown was patron, willingly left to the clergy, (the strenuous and zealous opponents of the Jacobite party,) the settlement of parishes : And so it was, from these and other causes, that for many years after the act 1711, the patrons rarely if ever presented, and that the presbytery either presented themselves, or gave to the people a choice or a selection from their own nominees. It may be said that nearly for thirty years this was the general, if not the universal practice. A call at large, as it was termed, was almost invariably moderated, and hence, I am thoroughly persuaded, has arisen, if not entirely the *form* of a Call in the case of a *patron's presentee*, at least the notions,—at the best undefined,—varying from day to day both in abstract principle and practical views,—which for some period gave rise to so much discussion,—as to the importance or necessity of a concurrence, by some number at least, in the patron's nominee, on the part of the congregation. These notions were practically and conclusively set at rest during the time of Principal Robertson, at least seventy years ago. You will find the history of these discussions in the *Treatise* of Sir Henry

Moncreiff, and in that part of Dugald Stewart's Life of Principal Robertson which it is understood that the late Dr Hill contributed. That they were set at rest,—that the controversy was understood to be over, and to have been both legally and authoritatively and beneficially disposed of, there cannot be a stronger proof than in the recommendation of Sir H. Moncreiff to his friends and his party not again to agitate the subject.

But in the practice I have now adverted, of a call at large by the congregation may clearly be found—I think that such, indeed, is the implied opinion of Sir H. Moncreiff himself,—the origin of the application to a *patron's presentee*, if not of the form of the Call, at least of the notions respecting it to which I have alluded.

The first division of opinion in the Church took place, as Sir Henry Moncreiff mentions, sometime about 1726, when certain classes revived the doctrine as to the popular election of ministers, “in opposition,” as he says, “both to the law of patronage, and “to the practice established under the act 1690.”

The secession, which began about 1733–34, by Ebenezer Erskine, gave rise to much agitation in the Church, and the defenders have quoted, as if of great importance in the present case, an Act of Assembly in 1736, which they seem to think fortifies the general declaration in the commencement of the Veto Act. It is in these terms:—“The General Assembly, considering from “Act of Assembly, August 6th 1575, Second Book of Discipline, chap. iii. par. 4, 6, and 8, registrate in the Assembly “books, and appointed to be subscribed by all ministers, and “ratified by Acts of Parliament, and likewise the Act of Assembly 1638, December 17th and 18th, and Assembly 1715, “Act 9th. That it is, and has been since the Reformation the “principle of this Church, that no minister shall be intruded “into any parish contrary to the will of the congregation, do “therefore seriously recommend to all judicatories of this Church, “to have a due regard to the said principle in planting vacant “congregations; and that all presbyteries be at pains to bring “about harmony and unanimity in congregations, and to avoid “everything that may excite or encourage unreasonable exceptions in people against a worthy person that may be proposed “to be their minister, in the present situation and circumstances “of the Church, so as none be intruded into such parishes, as “they regard the glory of God, and edification of the body of “Christ.”

This act, it will be observed, professes to rest on the Second Book of Discipline, and surely that reference shows how little warrant there was on the part of the Establishment for promulgating such a doctrine.

Sir H. Moncreiff states, page 61, that this declaration was

never acted upon,—was not intended to be acted upon,—was merely a concession in words, in the hope of humouring the people, and allaying the secession, but was of no authority, and was never regarded as such.

Mr Bell, forgetting, in the warmth of his argument, that he was not in the General Assembly, and in the course of a declamation much misplaced as to the conduct of a dominant party in the Church, turned round and asked, now at the distance of a century, why we passed an Act of Assembly which was meant to be a mockery. Personally, I should have no objection to be answerable for the ecclesiastical conduct of Principal Robertson and Dr Cook, but I protest against my clients, my Lord Kin-noull and Mr Young, being mixed up with the conduct of any party whatever in the Church. But really the question was an odd one, since this declaration of the Assembly was not promulgated by the *moderate* party, but by the *high* party, before Dr Robertson was known or his influence felt in moderating the conduct of the General Assembly. But I leave Mr Bell to find an answer to his question in the work of Sir Henry Moncreiff.

Reference is made to a case in 1740, which Sir Henry Moncreiff mentions as perhaps the only one of the kind in the whole history of the Church of Scotland, in which there had been violent commotions and tumults in the parish of Currie, against the settlement of a Mr Mercer, nominated by the patrons, the magistrates of Edinburgh, and the settlement was consequently not proceeded in. This individual had been the person first to move a censure on Ebenezer Erskine. The General Assembly refused to settle him on account of the difficulties which attended his call. That the six months had expired, seems to be admitted on all hands. But the important and remarkable fact is, that the Assembly did not venture to find that the presentee was *not qualified*, or that the patrons could be *compelled* to appoint another person, or *had forfeited their right*, owing to the opposition of the parish. On the contrary, it appears from the minutes of Assembly, that Mr Mercer acquiesced in another arrangement and practically withdrew. 2. That a committee had been appointed to confer with the parties, with the view of bringing about a comfortable settlement. 3. That the period of six months was admitted, from the date of the proceeding in the Assembly, to be open to the magistrates as patrons;—that the patrons were *recommended* to give a leet to the people, but that if a satisfactory choice was not made by the people out of such leet, or if the patrons *would* not give a leet, that the presbytery were to proceed and settle *any person presented* by the magistrates within six months from the meeting of the Assembly.

Thus this case, when understood and explained, affords the strongest proof, that while the Assembly, with a view to expe-

diency, wished to accommodate matters in this particular parish, they did not attempt to hold the opposition of the people to be a ground for excluding the patron's right of nomination, if persisted in, much less for inferring a forfeiture of it *pro hac vice*.

From about that period, or at least from 1750, Mr Bell has admitted that the course of a great mass of precedents respecting opposition to presentees, and the nature and object of a Call, has settled practically and, as he said, judicially, in the Church, this point, namely, that the congregation when they object must, in support of their opposition, assign and substantiate *reasons*, of the *validity* of which the presbytery were to *judge*, and that the want of an expression of *consent*, by signatures to the Call, was not sufficient.

This course of decisions by the Assembly as to cases of presentations by patrons is not to be confounded with the numerous class of cases, both at a prior date and subsequently, in which the party was settled, either on a presentation by the presbytery, *tanquam jure devoluto*, or on a call at large by the people—the patron not exercising his right. Of the latter are all the cases alluded to by Mr Bell, as given in Mr Whigham's very instructive evidence before the Patronage Committee, in some of which, so entirely was the matter left to the Presbytery and the parish, that after a person was ultimately chosen by the congregation, they applied to the patron for a presentation in his favour, in order that his *title* might be complete.

In these cases a variety of questions were necessarily opened up as to the amount and weight of the concurrence in the Calls to the different candidates, embracing every possible question as to the heritors and parishioners,—their status, motives, and especially their reasons of preference to the one, and of objection to the other. The discussions were interminable and most injurious. But still, be it observed, that (as in the class of cases on presentations by patrons, the legality of objections was in such instances the subject of decision by the presbytery and the church courts, so also) in the *latter* case (that is, of a Call at large, the patron not exercising his right at all,) the *reasonableness* of the grounds assigned for a preference or objection by the congregation was equally decided upon and determined by the presbytery. In no case had the people the power of arbitrary rejection. Nay, even in the case of a Call at large, the matter was not decided merely by the votes of the majority. The presbytery and Church Courts judged of the competition—not merely in order to ascertain the real majority, but also to decide upon the merits and claims of the different candidates, and the sufficiency of the preference given by the majority to one over the other,—in short, to decide which would

be the fittest pastor of the parish. Hence the whole of these cases are in truth equally precedents in the practice of the Church against the new-fangled notion that the jurisdiction of the presbyteries can be surrendered in deference to the will, or to gratify the caprice, of the people, or that there exists in any majority a peremptory right of rejecting the person legitimately proposed, whether by the session, or heritors and session jointly, or regularly, on the occasion of a call under the sanction of the presbytery. The only case, indeed, in which a trace is to be found of the extravagant doctrine,—that opposition by the parish was of itself sufficient, as a legal ground, for laying aside the presentee, or that the church courts could assume the patron's right *therefore* to be forfeited,—is the case of Auchtermuchty in 1735, which I previously noticed; and the decision of the Court of Session in that case practically and most effectually put down the pretension, which never was renewed by the Church.

On a matter so very extensive and so full of details, I must ask your Lordships to refer to the various publications already mentioned, and to others equally well known to the Court. The result to my own mind has been a very strong conviction of the truth of the following propositions;—1. That the form of a Call was not originally applicable at all to the *presentee* of a *patron*. 2. That the long and general practice of settlements under the Act 1690, and subsequently by a Call at large, and the discussions respecting such Calls, introduced notions respecting the same, which were gradually extended, without authority, and against the plain provisions of the statutes, through popular misapprehension, to Calls to presentees,—that this misapprehension was fostered and made use of by the opponents of patronage, and though it never prevailed, yet it gave a great tinge to the party discussions in the Assembly till the wisdom of Dr Robertson put an end to the whole question.

The form and object of the Call, as I already pointed out, seems to me clearly to confirm this view. It is an invitation—an expression of assent. Now the true and constitutional privilege of the congregation in regard to the presentee of the patron is, since he is to be tried and admitted by the presbytery, to state and urge objections upon which the presbytery are to decide; and I think it quite apparent that in principle the Call was not applicable to a patron's presentee, as any necessary part of the ecclesiastical process—much less as consistent with the civil right, if the Call is to be construed in the way contended for by Mr Bell.

The remarkable absence of all authority, not only in Parliamentary but in Church Records, for any early notice or recognition of the Call, as any check upon or as applicable to the presentation of patrons, during the periods when patronage subsisted, seems powerfully to illustrate and confirm this view.

But even if the *form* of the Call did at an early period obtain as to the presentations of patrons, it is perfectly clear that the notions respecting its importance in such cases broached about 1725, arose from the universality of the settlement of ministers upon Calls at large. And further, from whatever source these views originated, there is no doubt that they never prevailed.

Mr Bell took an extraordinary mode of dealing with the course of the *judicial* proceedings of the Church respecting Calls for the last eighty years. He simply announced, that he and the small majority who passed the Veto Act (a majority which I believe would never again be obtained) regarded them as *against law*, and were entitled to lay them aside,—that as they might have begun a new course of judicial decisions in exact opposition to the authority and practice of the Church ever since the question was agitated, by disposing of every individual case on the ground that opposition to the presentee was a valid objection; so they thought it best and most convenient at once to pass an act that should embrace every future case. What simplicity of confession! I make no doubt they thought the *summary*, to be the *more convenient*, course. They would have been puzzled in the state of the existing law, remaining bound to proceed to the trials, to find the presentee not qualified in respect of opposition, for which no reason or ground was to be assigned to them:—And hence the extraordinary contrivance of giving the people, by a sweeping enactment, the right to interpose a rejection of the presentee, which should preclude peremptorily the presbytery from proceeding at all in the settlement, or taking him on trial. But the very object of this device, whereby that is attempted to be done in wholesale legislation, which *could* not have been attempted in individual cases by judicial determination, sufficiently demonstrates the illegality of the measure. This very remark, however, of my friend shows the Court the force of my grounds of complaint. Had they judged of each case, they must have pronounced a *decision* in each case, *causa cognita*—they must have decided, as they did in Auchtermuchty in 1734, that the opposition by the parish was a judicial ground for refusal to settle, and that “the opinion of the parish was a trying of the qualities” of the presentee—as the Church said in that case—and so in each case the illegality of their sentence would have been apparent on the face of the proceedings. Hence originated, in the desire to deprive patrons and presentees, both of their rights and of the means of obtaining redress, the notion, that by a general rule which should preclude the presbytery altogether from judging in the matter in the individual case, the right to try the legality of the proceeding would be excluded, since the presbytery had no choice left in any case, and acted not judicially but ministerially: Vain indeed such a notion, as all other devices will always turn

out to be, intended to do, what is incompetent, by any *indirect* course. But you see from this remark of Mr Bell, that the real object of the Church was to avoid a judicial determination in the case of each presentee. But what is the provision of the statutes 1592 and 1712? Why,—that on each presentation the presbytery are to give collation in each case; they are to admit and receive the presentee if qualified. Hence there must be, in compliance with these statutes, a judicial deliberation and decision by the Church courts in each case: If not, that which is done is not in the exercise of the power of collation, and of the duty to admit and receive the presentee if qualified: Hence the rejection is not in terms of the statute—for the right and duty to judge have not been exercised and performed.

After disposing of the whole practice and judicial determinations of the Church for nearly a century, by announcing that the Church was entitled to lay them all aside, and to take up, without the least regard to precedent, and with as much ease as a man changes one walking-stick for another, totally opposite views according to the accidental majority of the day, it did appear to me somewhat whimsical to hear my learned friend, in the very next sentence, claiming authority for the deliberate opinions of the Church, and making an appeal to your Lordships (as if that was matter for judicial consideration,) on the inexpediency, at the present moment, when the Church is so virulently assailed from without, of calling in question and denying effect to its proceedings. The *expediency* of this Veto Act, or the consequences of the judgment of your Lordships, form no part of my case. All I shall say is simply, 1. That if the change is expedient and fitting, and generally desired throughout Scotland, which I do not believe, Parliament can make it; and, 2. That as a member of the Church, it does seem to me to be a singular moment to choose, with reference to its interest and security, for an assumption of legislative powers, involving a violation of civil right—an admitted disregard of the precedents and practice of the Church for nearly a century, as destitute of all authority, and requiring for its support a claim for the independence of Church Courts, and for their spiritual authority, only paralleled in the usurpations of the Church of Rome.

My Lords, I wish to avoid declamation:—But I cannot pass over another remark, with which my learned friend in no measured terms followed up his admission as to the course of the decisions and practice of the Church for so long a period respecting Calls. He announced to us in this, as well as in other parts of his speech, in plain terms, that, be the decision of the Court what it might,—although you should find the Act of Assembly to be altogether incompetent, and the veto utterly inconsistent with the civil right of the patrons,—yet

that the Church would hold itself independent,—would, as each case occurred, set the judgment of the Court at defiance,—refuse to admit or settle any presentee to whom the people objected, and though *nominally* taking him on trial, yet, *under that cover and pretext*, reject him as unqualified, and so accomplish their purpose. Becoming and decent announcement on the part of the Church! Admirable recommendation for additional support from the State at a period not indeed of insecurity, but of virulent attack! Fortunately, as we shall presently see, the decisions of this Court afford the full and effectual means of redressing and preventing wrong done under such a pretext. But I congratulate the Church on the credit it is to acquire from the supposition, thus made by its Procurator, that the Church Courts, discharging their solemn duties under their ordination vows, are to prostitute their deliberations by insidiously and in an underhand manner accomplishing the object, which they cannot do openly, and in the *trial* of a presentee, pronounce a solemn deliverance that he is *not* qualified, when that is not their opinion or judgment of the man, but a judicial falsehood for effecting an illegal end. I anticipate no such conduct on the part of the Church to which I am attached.

My Lords, I own I am always inclined to laugh at and treat with scorn all blustering declarations by any party or body, that they will hold themselves independent of the judgment of the Civil Court, and set at defiance the authority and the supremacy of the Law. The judgments of the Supreme Court of Law, solemn, authoritative, carrying with them the weight of the civil power, whose voice they are, and the attachment of the people, of whose rights and liberties their authority is the best protection, have always been found, and will ever be found, sufficient to silence all such pretensions. The authority of Judicial Determination, has been exhibited on a wider field, than that on which your Lordships adjudicate, and has proved to be more than equal for a mightier power than that even of the Church of Scotland. When the federal union of the United States of America was formed, with a common legislature for general purposes, but each state retaining its separate rights and laws and customs, and individual executives and legislatures, the problem at once arose, how the probable encroachments by the general legislature on the rights of individual states might be prevented or checked. The wisdom of Washington and Hamilton solved the problem. They proposed that the Supreme Court of the whole states, as the ultimate resort of all conflicting interests,—the Court of Law of the Union,—should decide the question, even as to the competency and legality of the acts of the supreme legislature. The result has proved the wisdom of the recommendation. In the wildest outbreaks of American democracy, in the fiercest conflict of parties, and the most violent collision of passions, fostered by provincial jealousies, and em-

bittered by provincial interests, when the acts of Congress have been challenged as unconstitutional, as incompetent, because inconsistent with the fundamental law of the Union, the stern and unbending decisions of the court of law have silenced the contentions of that great republic, and awed by the majesty of the law, their mighty parties have retired in submission from the political objects, which the Court told them could not legally be carried through. Doubt not, my Lords, that the judgment of the Court must have effect, not only against the pretensions, but with the judgment and reason of the Church : Little as I doubt the efficacy of your power to enforce your decisions, I doubt even less the readiness of the Church, if told by the law that they have gone beyond their powers, to retrace their steps, and to submit to the majesty of the law.

Before closing this part of my argument, I have to request your attention to the manner in which the presentation in this particular case was dealt with by the Presbytery of Auchterarder, and to some remarks upon the point. I do so, because it will irresistibly appear upon the face of their minutes, that the *procedure* which took place under this Veto Act in this particular case, is totally apart and separate from the Call moderated by the Presbytery. The minutes have been already brought before the Court. The presentation and the acceptance were laid before the presbytery in the usual way.

Then " the presbytery also considering, that all the documents " usually given in in cases of this kind, have already been laid on " the table, along with the presentation by the Earl of Kinnoull " to Mr Robert Robert Young, preacher of the gospel, to be minister of the church and parish of Auchterarder, did, in pursuance of the first regulation of the Act of Assembly anent calls, " *in so far* sustain the presentation as to find themselves prepared " to appoint a day for moderating in a call to Mr Young." They then appointed Mr Young to preach, and a day on which they were to " meet to moderate a call in the usual way." " From " which sentence the presbytery, in so far as it at all sustained " the presentation, Messrs M'Kenzie and Walker dissented, on " the ground, that by so doing, the presbytery did seem to homologate and approve of patronage." These gentlemen you see go all lengths : But they are consistent in their views ; they see perfectly the impossibility of reconciling the procedure as to the veto with giving any effect at all to the patron's right of nomination.

The meeting having met on the day appointed, the minutes bear, " the presbytery then proceeded to the church, when, after " sermon by their moderator, from Mark, 12th chap. 10th and " 11th verses, there was produced and read a call to Mr Robert

“ Young, to be minister of the church and parish of Auchterarder ; and an opportunity was given to the heritors, elders, heads of families, and other parishioners, to sign it. Mr Lorimer then signed for the Earl of Kinnoull, as patron, being his factor ; and the call was further signed by Michael Tod and Peter Clark, heads of families.

“ The presbytery *then* proceeded, in terms of the third regulation of the interim act of the last Assembly anent calls, to *give an opportunity* to the male heads of families, being members of the congregation, and in full communion with the Church, whose names stand in the roll which has been inspected by the presbytery, to give in special objections or *dissents*, when no special objections were given in.

Thus, then, the Court will observe, the procedure as to the *Call* was exhausted and closed. Whether the call would have been insufficient, because few signed it—whether the presentee's settlement could have been refused in respect of any want of *concurrence* by the people, was *one* matter, and a *separate* point, which, if raised, would have been a question for the presbytery, to be decided by them as a Church Court, subject to the review of the superior Church Courts. But you will immediately find that no such question was raised or deemed to be competent. Again, the part of the procedure as to *special* objections to the presentee, to be stated at this stage of the proceedings for the opinion and judgment of the presbytery, was also closed and exhausted ; and then commences a totally separate matter, having no connection whatever with the call. The minutes proceed.

“ A mandate from Mr Robert Young, presentee to the parish of Auchterarder, to Archibald Reid, Esq. writer in Perth, was given in, authorizing him to appear as his agent in this case ; which mandate having been read was sustained, Compeared William Thomson, session-clerk of Auchterarder, and being asked, produced a roll of male heads of families in the parish of Auchterarder, in terms of the regulations of the act of last Assembly anent calls. At this stage Mr Reid was heard, and objected to the presbytery either receiving or acting upon said roll, inasmuch as the same was not made up either within the time, or in the manner prescribed by act of Assembly. The presbytery feel themselves obliged to repel said objection, they having already sanctioned the roll as given in by the kirk-session, and as containing a correct list of male heads of families in communion with the Church within the two months after the rising of the Assembly, and after the last dispensation of the Lord's Supper in the parish. Against which sentence Mr Reid protested, and appealed to the next meeting of the Synod and Perth of Stirling, for reasons,” &c.

After some discussion as to extracts required by Mr Reid,

“ It was then moved and seconded, that the Presbytery do now
 “ proceed in this case, in terms of the regulations of the interim
 “ act of last Assembly anent calls. It was also moved and second-
 “ ed, that an appeal having been taken against the decision of the
 “ Presbytery, over-ruling the objection taken respecting the roll,
 “ the Presbytery sist procedure till that appeal be disposed of.
 “ After some discussion, the mover and seconder of the second
 “ motion, with the leave of the Court, withdrew it, upon the un-
 “ derstanding that they are not to be held as approving of the first
 “ motion. The Presbytery then, in accordance with the first mo-
 “ tion, agreed to proceed in this case in terms of the regulations
 “ of the act of Assembly. Against which sentence Mr Reid pro-
 “ tested, and appealed to the next meeting of the Synod of Perth
 “ and Stirling, for reasons,” &c.

I may just notice in passing, and in doing so will, I doubt not, at once dispose of a very frivolous plea, (which formed the fourth Head of my friend's argument) that Mr Young is barred from pursuing this action in the civil court, because, forsooth, he protested against the roll of male heads of families, as not made up either within the time or in the manner prescribed by the act of Assembly, and tried that point in an appeal:—And hence it is said, forsooth, that he has thus *acquiesced in*, and *acknowledged* the *legality* of the Veto Act so as to preclude this action. Really this is catching at a very poor pretext, indeed, for evading the present discussion. Of course, if Mr Young's case *did not fall within* the Veto Act—if there was no roll made up in terms of it, that was a preliminary and a very good reason why, be the Veto Act competent or not, it was not to be applied to his case. But can the trial of that preliminary objection in the smallest degree bar the presentee from maintaining in the Civil Court that, if you hold me to be within your Veto Act, it is in no degree competent? I look on this point to be so utterly frivolous that I shall not advert to it. Neither do I believe that it will even be noticed in the reply to me by the Solicitor-General.

Then—“ In conformity with the regulations of the act of Assembly, the Presbytery then proceeded to afford an opportunity to the male-heads of families, whose names stand upon the roll, to give in dissents from the call and settlement of Mr Robert Young as minister of the parish.

“ The following heads of families, whose names stand on the roll, did then appear before the Presbytery, and did personally deliver their dissent, or disapproval of the presentee, and their names were taken down by the clerk of Presbytery; viz:—
 “ (*Here follow the names.*)

“ The Presbytery found, in terms of the ninth regulation, that dissents have been lodged by an apparent majority of the persons on the roll inspected by the Presbytery. The Presbytery

“ did then, in terms of the ninth regulation, adjourn the proceedings in this case to their next meeting, to be held at Auchterarder on Tuesday the 16th current. Against which sentence of the Presbytery Mr Reid, on the part of Mr Young, without prejudice to his former appeals, protested, and appealed.”

Then the minutes bear at the next sederunt,

“ The Presbytery then proceeded, in terms of the twelfth regulation of the act of Assembly anent calls, to ascertain whether or not the major part of the persons on the roll, of male heads of families, in the parish of Auchterarder, inspected by the Presbytery, entitled to dissent, who dissented against the settlement of Mr Young, do still adhere to their dissents; when, on the question being asked by their moderator, none appeared to withdraw their dissents. The Presbytery at the same time found, in terms of said regulation, that there is a majority of the persons on the roll still dissenting.

“ The Presbytery then proceeded, in terms of the thirteenth regulation, to give an opportunity to the patron, presentee, or any member of Presbytery, to require all, or any of the persons dissenting, to appear before the Presbytery, at a meeting to be held in terms of said regulation, to declare, in terms of the resolution of the General Assembly; when, on the question being asked by their moderator, no such requirement was made. The Presbytery therefore *adhere* to the above *finding*, that a *majority of the persons on the roll still dissent*.

“ *At this stage, Mr M'Kenzie moved, that the Presbytery do take into consideration the call to Mr Young, presentee to Auchterarder, and do find, that it being signed only by three individuals, and of these only two members of the congregation, that said call is not a good or sufficient call; and do declare that no settlement can take place thereupon; which motion was duly seconded. It was also moved and seconded, that the Presbytery refuse to act in terms of this motion, as being incompetent at this stage of the business. The state of the vote was fixed first or second motion; when the roll being called, and votes marked, it was carried second motion. Which sentence being intimated, Mr M'Kenzie dissented, and protested for leave to complain to the ensuing meeting of the Synod of Perth and Stirling, &c. Upon account of three appeals having been taken against their proceedings, at their last meeting to the Synod, the Presbytery sist procedure in this case till they learn how these appeals are disposed of.*”

I think we are indebted to the inconvenient, but straightforward, zeal of this Mr M'Kenzie, for a proceeding well calculated to show practically, that the giving of the dissents, and the consequent rejection of the presentee, has no sort of connection “ with the matter of the Call,” and that the deliverance which is necessarily to

issue in respect of the veto, is no part of a judgment of the presbytery regarding the Call. Mr M'Kenzie, you see, makes the motion, that the call is not a good or sufficient call, so soon as the majority of dissents has been ascertained, and that no settlement can take place thereupon : And, to be sure, if this procedure as to the dissents had really any connection with the Call, either in form, in substance, or in object, this was the very issue to which the dissents would have brought the question upon the Call. But then that would still have been a matter for the opinion and judgment of the presbytery. They would in that view deliberate and decide. Their judgment would have been liable to review :—And so, what is it they do ? They refuse to act in terms of this motion as *incompetent*. Indeed ! Incompetent to find the Call not to be a good one. If the presbytery possess by law the power to reject a presentee in respect of the alleged insufficiency of the Call, most strange it is to be told, that this veto is the result of, and part of the Call, and yet to find that it is incompetent, when the dissents of a majority are proved, to connect this with the Call at all.—“ Incompetent at *this stage* of the business,”—What does this mean ? Is it because the proceedings as to the Call had been, in truth, closed and exhausted as a separate matter altogether from the proceedings respecting the Veto ? Or is it because such a question was excluded by the terms and principle of the regulation of the Assembly ? I care not what explanation is given of the matter. I say this motion brought to the test the plea, that the veto was connected with the Call. Mr M'Kenzie was consistent in his principle. If the veto can be brought within the Call, it can only be upon the ground that the invitation to and concurrence in the presentee at the time of the veto, is insufficient for the object of a Call, which is the expression of assent. But then this view would have raised a question for the opinion and judgment of the presbytery in each case, whether the concurrence by the Call was sufficient,—and that result (1.) would have asserted the Proposition from which the Church shrunk back, that *concurrence* by the people was necessary to give effect to the civil right ; and (2.) would not have bestowed that peremptory right of rejection on the part of the people by which the Church hoped to avoid the responsibility, and the consequences of any deliverance at all respecting the presentee.

Yet, to be sure, after hearing the attempt, repeated in every form, to make out that the dissents are a natural part of the procedure and purpose of a Call, it is marvellous to see in the very first case under this Veto Act, the presbytery obliged to repudiate such a notion in the most striking manner.

The matter stood over in the presbytery till the 7th of July, when the result of the appeals to the Assembly on points of form was intimated, and *as soon* as this intimation was made, the pres-

bytery issued their final deliverance as the necessary result of the veto ; and, what is very curious, they refuse to receive a dissent by one of their members, expressly upon the ground that they had no choice whatever as to the course which they were to follow, and were only acting under the force of overruling necessity, and not in a deliberative character, in issuing the deliverance which the veto rendered necessary.—The minutes bear,

“ After consideration, it was moved and seconded, that, in conformity with the sentence of the General Assembly 1835, and the interim act of the General Assembly 1834, the Presbytery do now *reject* Mr Young, the presentee to Auchterarder, *so far as regards the particular presentation on their table, and the occasion of this vacancy in the parish of Auchterarder, and do forthwith direct* their clerk to give notice of *this their determination*, to the patron, the presentee, and the elders of the parish of Auchterarder. The Presbytery agreed to this motion, and accordingly did, and hereby do, determine in terms thereof. Which sentence having been intimated, Mr Clark tendered a dissent, bearing to be against this resolution of the Presbytery, and hereby holding himself to be free from all the consequences that may result from the judgment of the Presbytery. The Presbytery refuse to receive this dissent, *1st, because Mr Clark declared, in the presence of the Presbytery, that the decision to which the Presbytery had come, was the only one to which, in the circumstances of the case, they ought to have come ; and 2d, because neither he, nor any other member of Presbytery, put any different motion on the record, as the Presbytery conceive ought to have been done, in order to entitle him to enter his dissent constitutionally.*”

Now the Court will particularly remember, that the last procedure at the presbytery at the former meeting, on the 16th December 1834, and before they sisted procedure, was to find it to be *incompetent* to act in terms of Mr M'Kenzie's motion, “ that the call should not be sustained ;” and the *next* thing done, the moment that they meet, after the procedure in the Assembly as to the making up of the roll, is to issue what they themselves view as an unavoidable deliverance,—the rejection in respect of the veto, in precise conformity with the form of that deliverance, as prescribed by the General Assembly. Hence, then, it is beyond all question clear that there *never was a deliverance or opinion* by the presbytery as to the *sufficiency of the Call* :—That the procedure as to the Call was closed, and that the procedure as to the Dissents was separate and distinct from it :—That the one deliverance would have gone upon one notion, while the procedure as to the veto went exactly upon the opposite ground :—That the one deliverance would have been deliberative—a judgment founded on the opinion of the presbytery, which would have sustained the Call or not, according to their own views as a church court, and so would have

ben reviewable by the superior Church Courts :—While the other deliverance expresses no opinion, was merely ministerial, and intended simply to record the fact, that *another body* had rejected the presentee by a *veto* on that selection :—That the one deliverance, whether on a ground competent or not for rejection, would have admitted that the presbytery were bound to enter upon and execute their function of receiving and admitting ministers, and judging for themselves if they were qualified or not :—But then it would at once have raised the question decided in the Auchtermuchty case, —Had the concurrence of the people at the Call any connection with the *qualification* of the presentee? Is the concurrence of the people necessary to give effect to the civil right of nomination?—While the other deliverance was framed in the vain expectation, that by admitting an obstacle to exclude the presbytery from entering on their functions, they would be absolved from the legal consequences of any judgment inconsistent with the fact, that the presentee's qualities had not been tried at all.

Finally, this procedure, which exhibits the practical working of the scheme, demonstrates surely that the presbytery never took trial of the qualities of the presentee. They were precluded. It is in respect of being precluded, and only in respect of that fact, that they can issue any deliverance giving effect to the veto. Any deliverance in the shape of an opinion of the presentee would have been a judicial falsehood :—Hence the form contrived. But then does not all this militate the more strongly against the legality and competency of the measure? The act 1711, in restoring patronage, in *restoring, settling, and confirming*, declares that the presbytery “ shall and is hereby obliged to receive and admit qualified “ persons presented by patrons as heretofore.” Obligated to receive and admit. Does not this require that the duty of the presbytery is to be entered upon and executed? Does it not import that they are to act? Does it not import that they are the body with whom lies the disposal of the presentation? Does it not import that they are to receive and admit the presentee *if* qualified? And taking the procedure in this particular case, as the exhibition of the working of the veto system, I just ask, in summing up this part of my argument, where, in the words of the statute, is authority for another body to exclude the functions of the presbytery, and to reject a qualified presentee of their own will, before the presbytery enter upon the trial of his qualities? Where is the authority for the Church to surrender and refuse to discharge, the duty imposed? Where is the authority for holding that the very provision intended to secure and enforce the right of presentation restored by statute, may be defeated, and the restoration of the right rendered useless, simply by the Church refusing to acknowledge and to discharge the duty imposed by that provision.

On the *meaning and import* of this obligation—on its object

and plain intendment—on the unquestionable intention of the Legislature to impose and enforce a plain duty on the Church, I have not heard one word from my learned friend. The statute is met broadly and openly by the claim of independence—by the plea that, be the import and character of the obligation what it may, the Church may set the statute at defiance:—That if they choose to disregard it, they can do so safely until (whimsical admission !) the Legislature again interferes,—though in what way a new enactment of the Legislature is to be enforced, except in a court of justice, I know not—by the plea, in short, that churchmen and Church courts are independent of the civil power, exempt from the jurisdiction of the civil courts, and may commit gross wrong and flagrant illegality, which the Supreme Court has neither the power to prevent nor redress.

And so, my Lords, I am brought to the *second* great branch of the discussion,—the jurisdiction of this Court, and the remedies within your power for explicating that jurisdiction.

LORD JUSTICE-CLERK.—I must really suggest, my Lord, that this seems, especially at so late an hour, the proper stage in the Dean's argument for giving Him relief.

LORD PRESIDENT.—Then to-morrow, Mr Dean, after the rest of the business of the Court is over.

DEAN OF FACULTY.—I thank your Lordships.

Thursday, December 7th.

THE DEAN OF FACULTY.—IN continuation, and I trust, my Lords, in conclusion of the argument which I have been addressing to the Court—an argument remarkable *only* for the indulgent patience with which it has been listened to,—I have now to direct your attention to the question of Jurisdiction.

There are four points requiring attention in any such general question.

1. The nature of the wrong which the Presbytery or Church Courts may commit.

2. The extent to which the Civil Court *has* interposed or *may* interpose.

3. The remedies adapted for the wrong, varying with the time at which the interposition of the Civil Court is claimed.

4. The position in which the Church Courts are when the wrong is done or begun.

My Lords, I now *assume* that wrong has been done—that the measure of the Assembly is incompetent and illegal,—that civil right has been violated—that a duty and obligation imposed by

statute has been disregarded and set at nought to the violation of the civil right, and to the effect, if not with the design, practically to destroy the value of the civil right. I say I now *assume* the wrong:—For really there is no such fallacy or confusion as mixing up, as my learned friend did throughout, the competency of this measure of the Church, with the question as to the extent of your jurisdiction to prevent wrong. The *condition* of the argument as to the Jurisdiction of the Civil Court, whether in law or in logic, must be the admission of illegality and of wrong. We do not ask you to *alter* and *review* a procedure, which we *admit* to be *competent*, on the ground that it is inexpedient, and an erroneous determination in a matter *committed* to the Church. We come to this Court because we allege illegality and wrong. The *assertion of wrong* is the foundation of our action. We must prove the assertion. If there is no illegality—if there is no wrong in violation of a civil right, we have no case. If the measure is competent, and within what is committed to and inherent in the Church, this Court can have no jurisdiction, and our only ground for invoking the jurisdiction and interposition of the Court, is incompetency, and wrong.

Hence, in arguing the Jurisdiction of the Supreme Civil Court, I assume the wrong. No doubt, my Lords, I well know the immense advantage in this question, which a correct apprehension of this *condition* of the argument gives me. For as soon as it is admitted that the inquiry as to the Jurisdiction as to the Supreme Civil Court is to proceed upon the assumption that wrong was done, I believe in all cases when these two points are kept separate, there is an end of any such question. An illegal and incompetent act by any body in the State, violating and doing gross wrong to a civil right, and yet the want of jurisdiction to prevent or redress the wrong, to declare the illegality, and to protect the civil right, implies utter confusion in the principles of the social system in any state where this result can hold,—a confusion never to be presumed or admitted. The Supreme Civil Court is not disputed to be in all *other* cases the tribunal to keep all bodies in the State, generally speaking, within their proper sphere, to try the extent of their powers, and, above all, to protect civil rights. It will be for the defenders to prove that the Church Courts are exempted from such jurisdiction.

I propose to notice, in the *first* place, two grounds on which the jurisdiction or interference of this Court is said to be excluded. I take these grounds in the first instance, because they are distinct from the remainder of the discussion as to the jurisdiction of the Court, and one of them at least, perhaps involves indirectly a denial of some of the points which I yesterday endeavoured to establish.

I. It is said that this opinion in favour of the presentee by the majority of the male heads of families is a qualification, or rather,

I should say, for it is put negatively, that the rejection is a *disqualification*, and that the Church has power to declare disqualifications. To this plea I have four separate answers, each of them conclusive.

(1.) I say, in the *first* place, this veto is not disqualification,—because it is a *restriction* upon the *right of nomination*.

I do not mean to enter into any metaphysics as to the *jus nominandi* to offices, on which whole treatises have been written:—But I submit that this measure, in truth, divides the right of nomination into two parts,—*one*, the act of granting the presentation,—the *other*, the act in another body of rejecting that choice. This measure has no reference to the particular qualities of the particular individual presented. It is a general rule, that, as the patron is entitled to present, so the majority of a certain class of persons shall be entitled to reject, the Presbytery having no opinion upon the matter.

Now, the right of presentation does not come from the Church, which introduces this restriction. It existed prior to the Establishment. It was saved and preserved as a condition of the Establishment. Hence, then, observe, in considering this plea, the point under this head is not as to the *attaching* a condition to the right. The right, is to present a *qualified* person, and the defenders must show that rejection by another body is disqualification.

Now, on what ground do they say so? They say—Because a person whom the people reject, *ought not* to be their pastor. But is it not plain that this is a condition on the right of nomination which it was for the statutes, preserving and confirming the right of patronage, to impose or not?

Before the opposition of the parish can be taken to be *disqualification*, you must make out, that these dissenters are *entitled* to oppose without reasons, according to their own fancy or caprice. Until that is proved,—until their right to do so is made out,—their opposition cannot come in at all, and it is idle to begin the point by such a *petitio principii*.

The measure is plainly not of the *character* of disqualification. One party has a right to present. Now that is the *title* to the office.—But for the statutory provisions, that presentation would have filled the office at once. A right to *examine* is given to the Church. To them the presentation is to be addressed, that they may execute that duty. Then, if you say, as the act of Assembly does, that they shall only proceed to examine, *provided* a third party does not reject the man; if you say, that before they execute their duty a third party may peremptorily reject, you declare that the *title* is not *complete* under the presentation,—that the *nomination by the patron is not enough*, if a veto is put on that nomination:—And is not that veto in common sense, as it is in every other case whatever, a *restriction on the right of nomination*?

I just put it thus,—Is the exercise of the right of nomination free and unrestrained, if another party may, without reason, reject the person nominated? This part of the defender's case is nonsense. The patron is told that the *Church* is to *try the qualities* of the man he presents. He presents a man of whose qualities he has no doubt,—the tried pastor of another congregation. The Church say,—Well, this is all very good, but we can't inquire as to his qualities, for another party has a right peremptorily to reject him, and your nomination is not sufficient or complete to require us to take him on trial, if there is this obstruction in the rejection by the people.

I will not labour so clear a point farther. I submit, independently of all the arguments upon the statutes, this veto is not, in any legal sense, disqualification, but a restriction of, or a condition upon, the *jus nominandi*.

(2.) The veto is not disqualification,—for the law implies and requires that the judgment on the qualities of the presentee shall be the *opinion* of the *presbytery*. This clearly excludes the notion that a rejection by another body *without reasons* is *disqualification*. It is a mere evasion of the matter to say that the Church will allow the people to reject, and then hold their dissent to be a disqualification:—For observe, in each case it is still an opinion, reasonable or unreasonable, well or ill-founded, upon the qualities of the particular presentee; the only difference being, that the opinion of the *parish* is *substituted* for the opinion of the *presbytery*, and though the law requires that the presentee must be disqualified in the opinion of the presbytery, they pronounce none, but allow another party to exercise a peremptory judgment upon the matter. The question still is,—Is the *particular* person *disqualified*? The Legislature says the presbytery may reject him if disqualified: but then *they* are to judge, and the opinion of another body establishes no disqualification. Here is the great difference between this Veto Act, and any general regulation of the Church, as to qualifications of which *they* are to judge; such as a certain amount of literature, Gaelic in the circumstances of particular parishes:—capacity to see and hear, and the like:—In such cases the presbytery ascertain and judge of the fact. In the case of blindness, the fact and the personal unfitness are, to be sure, ascertained at once. In the case of attainments, the presbytery examine the individual,—and as to Gaelic, the state of the parish is also a fact of importance, and they decide for themselves according to the best of their judgment. In short *they* form an opinion on the *particular* presentee. But the opinion of another body can never be in law disqualification, when the duty of examination is specially committed to the presbytery: For the opinion of that other body is supposed to be formed on the individual, yet the presbytery form no opinion at all.

The veto, then, on this view of it, is merely the substitution of a different set of judges for those on whom statute has imposed the

duty of judging, and the Church, which is required to decide for itself, substitutes the opinion of another body. In no sense, then, can the veto be looked upon as relating to qualification, when the qualifications are to be tried only, according to the statutes, by one party.

(3.) The veto is not disqualification in any proper sense of the term:—For the term, “qualification” or “qualities” implies a requisite to be found in the presentee, with which the patron *can comply, consistently with a fair and free choice* on his part of a presentee. But then, I ask, how can a patron *secure the exercise* of his right by any selection he makes, however good? He chooses the best man in the Church, for instance, whom all the Church Courts would find to possess every quality desired for an excellent minister. It is of no avail: He is told that the people may peremptorily reject his presentee; that the Church cannot judge of his *qualities*, for the people are not *pleased*. If the reasons of the opposition of the people were to be ascertained and judged of, that inquiry would involve qualities. But if they are not to be required to assign any reason,—if they may act from caprice or prejudice—I ask, how can a patron ascertain and secure this qualification of pleasing others, so as to *save his right*? IN ONE WAY ONLY:—By *giving the people their choice*, and that is, not leaving to him the *free exercise* of his right. This result is plain. It is the direct effect of the veto; and hence the illegality of it becomes the more apparent.

It is thus clear, that the condition now required, is a requisite, which, consistently with a fair and free selection, the patron cannot secure, and hence is not qualification. The matter would have been more plausible, if the course had been on rejecting the individual to send back to the patron for an acceptable man; as a sort of compromise of the matter. No, say the church—we hold that this rejection is proof that he is not qualified. True *we* have not tried him: True *we* cannot tell you what the objection is; but he is not qualified; and hence if the six months have expired, you have lost your right.

Now, then, I say, that whatever is a qualification must be something which the patron may *secure* so as to *save his right* from forfeiture. But against the veto he cannot protect himself, except by a *surrender of his right* to those *who are to be pleased*. This is a very important consideration as a strict legal argument. The patron is to present *any qualified* person.—He has a free choice. The church by the system of licensing preachers improved the right of patronage; for instead of leaving the patrons in doubt as to the attainments required, the church trains and educates persons for the profession, examines them, and licenses them as preachers, so that unless the person has relapsed there is every fair ground to suppose the presentee qualified who is se-

lected from amongst them. But, then, to *please others*,—who are not to assign any reason for their dissatisfaction, who simply may reject,—how can any selection or choice *secure* that result, except by *previously* consulting *their* wishes, and taking a man in whose favour they have previously expressed an opinion. But is the patron called upon to *consult the wishes* and mind of *another*,—aye of hundreds, in *order to save his civil right*. In addition to finding a man with all the qualities the Church chooses to specify, is the necessity of *pleasing others* a condition *consistent* with the *free* exercise of his right of choice? Is he bound to *please others* as a condition of exercising *his* right? Is that in the statutes? Is he bound to run the gauntlet of a popular election (for such it is) of his presentee as a restriction on his right of nomination? How can he guard himself against that risk so as to save his right? I repeat, only by giving the people *their* choice. Hence it is plain that the veto cannot be a *disqualification*, for only such requisites can be qualifications, the possession of which the patron may by due inquiry secure quite consistently with the freest exercise of his right. The statutes say he is to choose a *qualified* person—but *he* is to choose:—He can easily find a *qualified* person:—But if he is to *please* others, that is not leaving him a *free* choice of a *qualified* man—for the possession of every qualification is not enough to please the tastes or to satisfy the wishes of others. Hence it is absurd to call this any thing but a veto on the patron's nomination.

(4.) Then the declaration by the Church, that it will take the opinion of another body, as substantiating unfitness, will not constitute disqualification; For if the Church can thus substitute another tribunal for its own judgment, what ought to be the result? Why,—*First*, that if on this account the presentee is to be deemed not *qualified*, he cannot be fit for *any other* parish, and still less for *this* on another vacancy, yet he is perfectly *qualified* in both instances; and, *second*, that whenever the Church has rejected a man as not qualified, on the ground of the opposition of others, the Court could not interfere to *any* extent whatever, *if* the *principle* is *good* that the opinion of others establishes disqualification. I press this now in reference both to what I formerly said as to the Auchtermuchty case, and as to other decisions I am presently to quote. The argument is:—The Church is to decide on the point, whether the presentee is *qualified*; and hence whatever they say is disqualification must be taken to be *legal* disqualification. Then, if this proposition is unlimited, if the Court is not entitled to inquire whether the qualification prescribed is consistent with the statutes, and with the civil right of patronage, the *result ought to be*, that in *no* case could a patron, whose *presentee* is rejected, obtain right to stipend.

I am putting aside at present the case of competing presenta-

tions, and I take the case of a presentee rejected as not *qualified*. If the Court cannot inquire whether the objection was *legal*, then the jurisdiction of the Court ought to be wholly excluded as to every right under a presentation, and in no case could the patron be entitled to retain the stipend. But, in the first place, the decision in the case of Auchtermuchty is a clear authority upon the very point that the Court is entitled to inquire if the alleged ground of disqualification is consistent with the statutes, and with the civil right of patronage, and that the opinion of another body does not establish disqualification.

Again, the Act 1592, c. 17, expressly declares, as the Court will remember, that if the presbytery refuse to admit any qualified person, it shall be lawful for the patron to retain the whole fruits of the benefice in his own hands. Now certainly the *Church* cannot contend that the *patron* is, *at his own hands*, to judge whether he has presented a qualified person, and to decide for himself when he is to retain the fruits of the benefice. The Church, again, cannot be the party entitled to declare that their refusal is just, and hence, that the patron is not entitled to retain the fruits of the benefice,—for the right to retain is given to the patron against the Church, and in order to enforce the obligation on the presbytery to admit his qualified presentee. Then who is to decide between the parties? Plainly the Civil Court alone. Then what is the Court to determine? why, the point whether the case has occurred which is to give rise to the right on the part of the patron to retain. Then what is to give rise to the patron's right to retain? Why an unjust and illegal refusal by the presbytery to admit. Then what is an illegal refusal? Why it must be a refusal to admit a qualified man,—and thus the question,—what is disqualification within the competency of the Church? what is disqualification consistently with the province and duty of the Church—is necessarily matter, as the Court decided in the Auchtermuchty case, for the determination of the Civil Court.

I am very anxious to bring this point fully before the Court. There is no question that the patron has a right in certain cases to retain the stipend, if the presbytery refuse to admit a qualified presentee. The Court is to decide that point. If the declaration by the Church is to establish what is disqualification, then the right of the patron is altogether nugatory. The Court could not decide to any purpose, and the remedy would be of no avail in order to enforce the obligation against the presbytery.

The statute clearly contemplated discussions arising out of an illegal refusal to admit a qualified person. Then it follows that the Legislature intended the Court to ascertain the ground of the refusal, and to decide upon its legality.

Now what is the plea of the Church? Simply that the rejection must be disqualification, because the Church declares it. Is that sufficient when the other party acquires a civil right in the event

of the refusal to admit being illegal? It follows as a necessary consequence, from the power and duty of the Civil Court to decide on the legality of the refusal of a qualified presentee, that the Church cannot by its own declaration constitute disqualification.

I do not think that the defenders are at all aware of the importance of this provision, enabling the patron to retain the fruits of the benefice in the event of the presbytery refusing to admit a qualified person.

As the occasion on which that right of retention is to arise is a point which the Civil Court alone can decide, the question, what is a legal objection to qualification, is at once brought within the province of the Civil Court, as the only foundation on which to determine whether the presentee was qualified, and whether the patron is to retain.

Then it from thence necessarily results,—1. That a declaration by the Church, if such is not consistent with the statutes, will not constitute disqualification; and 2. That if the presbytery do not judge of the presentee, there is a refusal to *act*:—and *a fortiori* the refusal to admit must be illegal, since it does not turn on the point, on which alone they can resist the patron's right to retain, viz. that the presentee was in *their* opinion not qualified.

You will see the importance of this view, especially when combined with the argument I previously submitted, that the devolution of the right of presentation to the presbytery was a point exclusively for the civil court. Hence I submit that the veto is not disqualification.

II. The Second Plea stated in bar of the jurisdiction of the Court is the alleged finality of the decisions of the Church Courts under the Act 1567, c. 7.

Now this plea, *if* sound, ought to be conclusive to *all* effects whatever, and ought to exclude the jurisdiction of this Court to give to the patron the fruits of the benefice when another than the presentee has been illegally inducted by the church. If the words of the Act 1567 extend beyond the *ecclesiastical cause*, and were meant to go further than to exclude a review of the opinion of the Church Courts by the King's Commissioners, they ought clearly to lead to the result I mention, of making the judgment of the Church Courts final and conclusive to *all* effects, and as to *all* consequences. There is plainly no ground for limitation, if the statute is to apply, (supposing it to be in force) as to any civil right whatever. And so Sir Henry Moncreiff thought. He admitted the law to be otherwise settled by the cases of Culross and Lanark, to which I am presently to advert: But he says, that in principle—looking to the meaning and construction of the Act 1567, c. 7,—the decision of the General Assembly ought in his opinion to be the sole determination to the benefice in all respects and cases

whatever. You will find his general opinion at p. 26. Again at p. 32, he argues that it is an absurdity that the maintenance and temporal rights of the benefice should ever be separable from the pastoral cure to which they are attached, and hence, that, on the principle of the act 1567, c. 7, the Church Courts should be the only tribunals to decide all questions respecting the office and the right to it. And certainly the plea must go this length if it is sound at all under the Act of Parliament.

But it is not sound, and is against solemn and repeated decisions of this Court.

(1.) The act 1567, c. 7, is not the sole or even the most important statute, assuming that it remains (so far as applicable) in force. It must be construed in reference to subsequent statutes, and the question, in truth, arises on the acts 1592 and 1711, not on this older statute, anterior to the institution of Presbytery, and in so many particulars not now applicable. This act 1567 did not directly, it will be observed, impose an obligation, by any words of imperative and express injunction, on the Superintendent to admit and receive a qualified presentee. This is one important distinction. Again, it said that, if the patron presents a person "qualified to his understanding" who is rejected, and then another within the six months, whom the superintendent might refuse to admit, *he* might appeal and so forth. But it gave him no other remedy,—on the face of the act no other remedy. On the contrary, the act 1592 gave the right to retain the stipend if the presbytery refuse to admit a qualified person. This is another great distinction.

Hence, then, it is quite clear, that the question as to the finality claimed for the decisions of the Church Courts, and as to the jurisdiction of this Court, cannot be raised on this act 1567 by itself. Indeed, it is at once obvious, that both of the additional provisions, to which I have adverted, in the subsequent statutes, raise questions for the civil court, even if this Court had no jurisdiction under the act 1567. The obligation on presbyteries to admit and receive qualified presentees is a question not raised under the act 1567. If the Court *can* enforce that obligation, then the question raised on the act 1592 is totally different from that raised on the act 1567. Still more, there is the other point under the act 1592, as to the patron's right to retain the fruits of the benefice, which was not embraced within the matters provided for by the act 1567, and as to which that act cannot decide any point respecting jurisdiction whatever.

(2.) It seems to be quite plain on the terms of the act 1567, that it relates solely to the ecclesiastical cause. If the patron presents a person qualified to his understanding, *he* may appeal from the superintendent to the Assembly, and *the cause* is to end with the decision of the Assembly. Now it was necessary, as there was no system of ecclesiastical polity established, to *provide* for an

appeal, if it was intended that the opinion of the superintendent should be liable to review. But bishops still filled all the dioceses—retained their jurisdiction, claimed the right of collation, and often exercised it. Hence it was necessary to exclude their jurisdiction, and also that of all King's commissioners, or the King's council, if it was intended to make the Assembly the ultimate court of appeal from the Assembly. The acts 1584 sufficiently show the importance of that provision. Again, “the cause” shall then end. What is that but the review of the opinion of the superintendent, (the ecclesiastical cause) which was begun by the opinion of the superintendent? But though the *cause ends* with the Assembly, that is a very different thing, indeed, from a declaration, that their judgment is to be *conclusive* to *all* intents and purposes whatever, and is to exclude inquiry even as to the legality and competency of their acts. The argument of the defenders confounds two separate things. It is one thing to say that a cause is to end in a certain tribunal, to the effect of excluding further appeal, and of settling the particular point before that tribunal, while it acts *within its power*:—And it is another, and a totally different thing, to declare that the jurisdiction of the Supreme Civil Court is excluded,—that the finality referred to excludes all inquiry as to the competency of the proceedings, which are to be held to be equally valid, whether within the province of such tribunal or not, and that the Church Court is to determine questions of civil right, for which such tribunal is not competent. It is quite clear that the provision in this act of 1567 cannot apply to the questions which occur under the different enactments in the subsequent act 1592, which makes no reference whatever to the prior act.

(3.) An ingenious attempt has been made to support the plea of finality on the statute 1567, and at the same time to reconcile the operation of that plea, with the admitted authority and effect of the previous decisions of the Court,—by urging that the principle of these decisions applies only to the case of *competing* patronages, that is to say, when the Church chooses to settle and induct the presentee of one patron, without waiting for the decision of the Court on the competing claims of another patron. I will presently show that the decisions are not limited to that state of facts. But observe, that the attempt to claim finality for the decisions of the Church Courts, to the exclusion of any jurisdiction by the Civil Court, in *some* cases only, while it is to hold in *others*, cannot be well founded under the terms of the statute founded upon. If the terms do at all bear the meaning,—that the judgment of the ecclesiastical court is final to the effect of excluding this Court from taking cognizance even of gross illegality,—then clearly the result ought to be, that their judgments must equally exclude your jurisdiction in all cases. The terms are quite general. It can then be of no consequence what the ground is, on which the presbytery refuse to re-

ceive the presentee, and on which the Assembly confirm the judgment. Whatever the ground, the result ought to be the same:—"The cause shall take end:" If these words are exclusive, in sound construction, of the jurisdiction of the Civil Court, it is in vain to say that they are exclusive *only* in *some* cases, and that in others the Civil Court may competently inquire into the grounds of refusal. The words are unqualified. The construction of them, whatever it is, must equally hold in all cases. They either relate to the proper ecclesiastical cause, or they have a wider meaning. On either supposition, the result deduced from them must hold equally in all cases.

(4.) The principle on which the plea on the statute 1567 is founded, if a sound construction, ought clearly to prevent, in any case whatever, the separation of the right to the stipend from the ordination to the cure:—One cannot imagine any view of policy giving such finality and exclusion to the judgments of the ecclesiastical court, which would not include *that* object as one of the main purposes thereby to be attained. Such separation is a great anomaly: It is a great evil. The object of the stipend is the maintenance of the minister serving the cure: But the subsequent statute 1592 did, nevertheless, contemplate and provide for such an evil, in the event of an illegal refusal by presbyteries to receive presentees: And the decisions of the Court have settled that it lies with the Civil Court to decide when that separation is to take place. The cases will be found to go much farther even than Sir Henry Moncreiff was aware of. Hence, it seems to be quite clear, either that the prior statute 1567 does not apply to the altered state of the law under the subsequent statutes, or that the construction put upon it by my friend is not sound, seeing that the ecclesiastical court have not this final jurisdiction in the most important point, for which such finality of jurisdiction could be intended.

(5.) But the manner in which the Church deal with us in regard to this plea of finality is a little extraordinary. The act 1567 expressly declares that, if the patron is dissatisfied with the superintendent's refusal to receive his presentee, he may *appeal* to the General Assembly, and that, by the judgment of the *Assembly*, the cause being decided shall take end as *they* discern and declare. Now, granting that this applies to presbyteries, the very principle of the enactment is, that the decision of the radical court shall *not* be *final*,—but shall be an appealable judgment, which the Assembly may alter according to their own view in each particular case:—And it is to the judgment of the Assembly only that the finality, whatever it may be, is given. Now the Church begin by a provision which not only excludes any judicial opinion on the case by the Inferior Court, but excludes all review of the rejection by the Supreme Ecclesiastical Court, and then they tell us, forsooth, that they can claim finality and exclusive jurisdiction

under this act 1567 :—When that finality is given only to the judgment of the General Assembly :—And of the appeal to the Assembly this regulation deprives us.

It is no answer to say—Oh ! but then there is a *general* regulation of the Church, which excludes that review by the Assembly. That will not do, for the statute assumes that in *each* case there may be a *cause*, which the patron may carry to the Assembly for alteration of the judgment of the Inferior Court.

(6.) But there is another mistake. Observe,—The finality, whatever it may be, is given only to *judicial determination of causes* by the Assembly. But that regulation, let its meaning be what it may, will not give unlimited *legislative* power to the General Assembly, or exclude this Court from judging of the legality of general enactments, which affect civil rights. Now the refusal of the presbytery in this case to act at all is founded on the competency of the *legislative* measure. And so, be the meaning of the statute what it may, it has no application to the present case.

I hope I have now disposed of these two pleas.

Let me now request you to observe the peculiar position of matters in which the jurisdiction of this Court is appealed to and its interposition sought.

I assume wrong to be done, and that, as in the Auchtermuchty case, there was no “ legal objection ” to the presentee.

Now the question may arise with the presbytery either *before* another is *ordained* or *after*.

The ordination is irrevocable. Nevertheless, the effect of the judgments of this Court has created a proper conflict of jurisdictions, or rather I should say, has caused contradictory results, rather than a conflict of jurisdictions, and contradictory results in the worst of all cases, namely, the separation of the maintenance for the office, from the person ordained. I say contradictory *results*, because, in truth, in none of the cases did the Church courts ever decide in opposition to any judgment of the civil court. In the class of cases I now advert to, the party complaining that his presentee was illegally rejected, did not come to this Court as soon as he might have done. He first tried the superior Church courts. The other nominee was ordained and inducted—the ecclesiastical process was over,—without any attempt made in time to prevent the presbytery inducting the wrong party. But still the fact of the ordination by the Church of a person to the cure did not lead this Court to hold that the benefice was thereby filled, if that ordination was a wrong to the patron. It did not prevent this Court giving all the redress they could. It did not prevent this Court trying the legality and competency of the ecclesiastical procedure. It did not prevent this Court holding, that when a wrong was done, that was a subject for their cognizance. It did not bar the Court

from protecting the civil right. Now, in all these cases, the Church had a great deal to say against the patron thus attempting to come to this Court *after* ordination, in order to withhold the fruits of the benefice from the person ordained. They had to urge that the patron should have tried to interfere *sooner*;—that, (with whatever effect in point of competency,) some legal proceeding should at least have been taken to interpell the Church Court, and to render the right to the stipend at least *litigious*, whether this Court would have *interdicted* the presbytery or not. But nothing whatever of that kind was done by the patron. The ecclesiastical process went on. The patron and his presentee limited their resistance during that period to the Church courts. The Church then ordained and settled:—and it was only after a person had been so ordained that the patron came forward in the civil court, contending that the ordination was illegal, and claiming the stipend:—And hence the Church could urge that, whatever might be competent in other cases, yet if the right to the stipend was not made litigious in due time, the person *ordained* ought to receive the stipend, and that the patron was too late in raising the question.

Now, certainly there is so much of *general plausibility* in this argument, as to the cases originating *after* ordination, that it must be admitted that the *strongest* interference of the civil court is to entertain a trial of the legality of the settlement *after ordination*, and to separate the fruits of the benefice from the person so ordained, in favour of the patron, who had not made the matter litigious *before* ordination.

In the present case the jurisdiction of the Court is appealed to in due time, in order to prevent wrong, and to exclude that anomalous and unfortunate result.

I think it will appear that, in the present shape of this case, no proper conflict of jurisdiction can arise.

Then, as to the true distinction between separating the duties and the jurisdiction of the Civil and the Ecclesiastical Courts on the one hand, and on the other, of improper interference with the Ecclesiastical Courts, in matters proper for their cognizance:—I do not ask this Court to *find* this presentee *qualified*, or to pronounce *any* opinion upon that point, or to review any judgment of the Church upon his qualities—or to assume any ecclesiastical authority by proceeding to ordain him, if the Church will not. I ask the Court to find that the presbytery *must execute their functions* in one way or another:—That they must enter legally and faithfully upon the duty prescribed by statute—that they are bound to take the presentee on trials, and to receive and admit him *if qualified*. The mode of discharging the duty is left to them. They are not entitled to reject upon grounds that are not *competent*. But if they enter upon their duty, and if they do try, they are accountable

only to God for the discharge of their duty. If they execute their functions—if they take on trials, the State trusts to their honest discharge of duty, both to pronounce a finding on the trial, and to admit and ordain if the presentee is a proper person. It is the refusal to take on trials—the refusal to act and to execute their functions,—which is the wrong here complained of.

When they execute their functions they enter on their ecclesiastical province : But the *refusal to act* at all—much more the refusal on an illegal ground—is a *civil wrong* ; for such refusal is against the statute, as much as the refusal in the case of the schoolmaster of Corstorphine.

I submit, then, this general proposition in point of law to the Court :—Whenever the discharge of a public duty is imposed by statute on a public body, as the condition of its establishment, I say the *refusal* to discharge that duty is a wrong ; and a wrong for which the individuals composing the body are amenable, be the body ecclesiastical or civil. In either case the body must be kept within its province, and compelled to do the duty imposed by statute, and for which, *inter alia*, it was constituted. The discharge of duty may be between them and their conscience : But discharge it—execute the duty—they must.

This proposition specially holds in this case : For, 1st, The discharge of duty is imposed as the *counterpart*, and as the *provision* for the *security*, of a *civil right* confirmed to another party, whose civil rights are directly violated and defeated by such refusal. 2d, It is imposed as the *condition* of *receiving a control* over that civil right. The Church wishes to keep the examination and admission—but to be entitled to refuse to take the presentee at all on trial ; while it is clear from the deduction I have given you, that the former was given only under the condition and in respect of, the express obligation, imposed on them at the same time, in order to prevent a disregard of the rights of patrons. 3d, The result of refusal may be the separation of the right to the stipend from the cure—and hence, as that is a great evil, the refusal to take on trials is clearly a wrong, which the civil court may take cognizance of, in order to prevent that undoubted evil. Any refusal to execute duty—to act—which *produces evil* to others, is a *civil wrong*. The result to the parish and to the Church of an illegal refusal, is to separate the stipend from any other person whom the Church might ordain :—Hence to prevent that evil the refusal may be corrected.

The distinction is most vital between a review or reduction of a judgment in the discharge of the duty imposed, on the one hand, and correcting the refusal to execute the duty at all—that is compelling the presbytery to act. If the presentee is taken on trials, the matter is committed to the Church, safely, wisely, and conclusively. If found on trial, and after hearing and judging of objections, qualified, the ordination is committed to the

Church, not only safely, but necessarily, because ordination can come from no unhallowed hand. But a *refusal to take on trials* at all, or rejection of the man without *legal* objection, is positive wrong under the statute. To say that the presbytery is an *ecclesiastical* body is no answer whatever, for that is precisely a claim for exemption for churchmen from the duty of obedience to the statute law. Now in this case, we come to Court in time to *prevent* wrong. We do not come with a claim merely for the stipend after another is inducted—but to be taken on trials, and that the Church shall proceed on the presentation. Now a declaratory decree in terms of the declaratory conclusions in this action,—viz. 1st, That the presentee is legally and effectually presented to the *Church and parish* of Auchterarder, 2d, That the presbytery are *bound to take on trials*, and to proceed to *receive* and *admit* a *qualified* presentee, 3d, That the rejection on the ground of the veto was *illegal*,—I say a declaratory decree in terms of these three conclusions will *exclude* the *jus devolutum*. Indeed, how else can I exclude the *jus devolutum*, except by a declaratory decree in good time? If I get such a decree, then the wrong cannot occur—for till the parish they must ultimately: But if it is found that the patron has not forfeited his right, in no way can they then fill it, but on this presentation—if the presentee is qualified. If I get this found—or, (if necessary) even during the trial of these points, then they may be interdicted from taking on trials any other man. This will necessarily follow if they are bound to take this presentee on trials, and if the court can *compel* them to do so. And then on continued refusal after declaratory decree—if such indecent regard of the civil court can be supposed—I can come here for a *decerniture* to take the presentee on trial, and can charge on that decree. Now here are ways of *preventing* that legal anomaly and contradiction, which the induction of another, while the stipend is to belong to the patron, creates. Here are ways of preventing the admitted wrong, (for wrong I assume,)—of preventing the admitted violation of civil right.

A conflict of jurisdictions is when one cannot even in due time *prevent* the wrong, and when results are *necessarily* contradictory. But there can be no conflict, if there is a *power to prevent* the wrong. It is a great evil the separation of the stipend from the person having the cure:—An evil, the occurrence of which is clearly inconsistent with the object of all the statutes, and with every notion of a legally presented presentee. Well then, as this evil may nevertheless occur,—as the statutes provide for this extreme result,—why, the claim of the Church, on the one hand, is *for the right to occasion this evil*;—Our plea, on the other, is for the jurisdiction of this Court to prevent its occurrence. I say, as the evil is undoubted, there must be the means in the civil court to prevent its occurrence, according to all the well-known general

principles of jurisprudence, which imply in the Supreme Civil Court authority to prevent wrong, and to prevent confusion.

Again, our conclusion beforehand as to the right to the stipend, is another practical remedy tending to enforce performance of the duty, and to exclude wrong. We know well that the Church cannot and will not persist in this illegal measure, if the result is, that the right to the stipend is to belong to the presentee illegally rejected in respect of the veto.

The Court has power to decide the right to the stipend—that is not disputed, and to withhold it even from the person ordained. Now then, it is just as clear, according to the principles and practice of the law of Scotland respecting Declaratory Actions, (that great remedy in our law by which a party is entitled to have his right declared in due time,—to have the act found to be illegal which *may* be or is injurious to him,—to have a judgment prohibiting the party from doing the wrong that is meditated, and which will infringe upon the right previously declared, and also to find the *consequences* of the party's civil rights in time to prevent interference with them,)—I say the principles regulating Declaratory Actions imply, that the Court has jurisdiction to decide the question as to the right to the stipend *now*, and *before another is ordained*. Then if so, here is an unquestionable mode of compelling the presbytery to act. We know well what was the practical result of the decision in the case of Lanark—Dr Dick's case. In every instance which has subsequently occurred, whatever might be the disadvantages of a parish remaining long vacant, the General Assembly has always directed the Church Courts to suspend their proceedings till the issue of any civil action respecting the settlement. The strongest case which can well be imagined in illustration of this, occurred recently in regard to the settlement of my excellent friend and relative Mr Hunter in the Tron Church. The question raised in the Ecclesiastical Court in that case was, the propriety and necessity of an assistant and successor appointed by the patrons to the aged minister of that parish, with his consent. That was really very much of an ecclesiastical question, and so this Court ultimately thought. The Church found the appointment to be necessary, expedient, and competent; yet, though no civil action was actually in dependence,—merely because one was intimated as likely to be raised by parties objecting to the legality of the appointment, the Assembly directed the presbytery to stop if an action should be raised, and to abide the result of the decision in the civil court. The determination of the right to the stipend is plainly and obviously the practical solution of all questions respecting the jurisdiction of the Church, and will put down all such attempts as the present for defeating or restricting the rights of patrons. No church will adhere to any measure, which is to produce the practical consequence of separat-

ing the stipend from the person, whom that measure, if followed out, would introduce into the living : And there is no such security for due regard to the right of patrons, and for the settlement of duly qualified presentees, as the decision which gives to the patron the stipend if his presentee is illegally rejected. I do not take up any vulgar imputation against the Church as looking to the benefit of its members, when I say that the right to the stipend practically solves all these questions, and is the great practical compulsitor on the Church to act in the line prescribed by statute, and to execute their duty towards presentees. A national establishment can exist and do good only by means of its endowments. If, therefore, this Court shall hold that the Veto is illegal,—that the presentee ought to be taken upon trials,—and that if he shall not be taken upon trials the patron will have right to the stipend, you have a practical remedy which must put an end to the Veto Act,—a remedy legal and constitutional,—a judicial remedy, which you cannot withhold from me if I am right :—A plain and important method for compelling the Church Courts to act.

Hence then for this purpose, as there is no question that, upon the principles of our Action of Declarator, you can *find the right* to the stipend beforehand, though there is no other party presented, I am entitled to have that remedy, in order to enforce the rights under the presentation, and practically to prevent the wrong, even if the Court could not follow up the general Declaratory Decree in this action. Nay, I am the more entitled to this practical remedy if the Court has no other means or jurisdiction for preventing the wrong.

These remarks naturally lead me to notice the argument against the jurisdiction of this Court, and against the competency of ordaining the Church to act, on which the defenders seem to lay the most stress. They admit that the part of the statute 1592, c. 117, giving the patron right to retain the fruits of the benefice, if his presentee is illegally rejected, must receive effect, and they admit that it has been settled as a result of this enactment, that the stipend may be withheld even from the person ordained and inducted by the Church. But then they say *this* is the *only remedy* competent. It was allowed, they tell us, specifically, just because the ecclesiastical courts were necessarily independent, and because the civil courts could not enforce the obligation imposed on the Church Courts of receiving and admitting a qualified presentee. True, the statute directs the presbyteries to do so,—true, they are under an obligation to do so,—and true, that the Legislature necessarily intended that this obligation should have effect. But still if the Church Courts shall disregard this injunction, it was foreseen that the civil court could not enforce it—that unless the Legislature again interfered in event of such wrong, there would be no redress, and therefore, as a countervailing remedy, and in lieu of the juris-

diction of the Civil Court, there was attached the provision, that the patron might retain the stipend. But this is the only remedy expressly given, and it was intended that it should be the only remedy. It is, to be sure, if wrong is done, but an imperfect remedy. But then, they say, it was the only one given, because the civil court could not enforce an obligation against the ecclesiastical courts. To this argument the greatest importance seemed to be attached by my learned friend.

I have many observations in reply to it.

In the *first* place, it proceeds upon the assumption that the ecclesiastical courts *must of necessity* be independent of the civil power, and that, as a necessary evil or condition of the establishment of a national Church, there could be no jurisdiction to enforce an obligation against them. Now where is there such necessity for this great evil in the erection of an Established Church? This is the fallacy which runs through every part of the argument of the defenders. It lay with the State either to subject the Church Courts to such proper control as was necessary in order to prevent confusion, to prevent and redress wrong, to keep them within their province, and annul what was incompetent, —or to bestow upon them that total independence, for which the defenders contend, and which, if wrong, is committed by the Church Courts, is undoubtedly an evil. It is quite idle then to begin the argument, which excludes the proper remedies, and denies the jurisdiction required to enforce obligations, by assuming that there *can* be no jurisdiction for such purposes over ecclesiastical bodies, and that, in instituting a National Church, the State must necessarily, by erecting ecclesiastical courts, make them independent. It would indeed be the very best, and the most formidable argument that ever was devised against the principle of Establishments, and in support of the voluntary system, if it could be once made out that the ecclesiastical bodies adopted by the State were *necessarily* independent of the jurisdiction of the civil court, and that the obligations imposed upon them by statute, as the condition of their establishment, could not in principle be enforced by the civil courts. But the notion is a plain mistake. There is nothing spiritual in the question which occurs as to enforcing any duty imposed by statute. Whether the body is ecclesiastical or not, the performance to the State of the duty imposed by a statute is a *civil* obligation, no matter to what the duty relates: and hence the obligation being civil may be enforced by the civil court, equally whether the body which owes the duty to the State is ecclesiastical or not. The defenders, then, are not entitled to assume that there *can* be no jurisdiction over the Church Court to the extent contended for.

In the *second* place, I deny the soundness of the proposition, that where an obligation is distinctly imposed by statute, and in

the event of violation, a countervailing right is given to another party, in order to diminish the *injury* as much as possible, that it thence follows that there is no jurisdiction to *enforce the obligation* and *prevent the wrong*, and that the only redress is the provision intended to diminish the injury.

The Plea is this :—An obligation no doubt is imposed, but there is a *remedy* given, namely, that the patron may retain the fruits of the benefice if the obligation is violated, and his presentee illegally rejected :—Hence this was the redress, and the only redress intended, and the giving of this redress *implies*, that the obligation *could not be enforced*, or *was not intended to be enforced* :—So far as it is said the obligation *could not be enforced*, that I have noticed. Take the plea on the *other* ground, that the remedy given *implies* that it was *not intended* to enforce *specific performance* of the obligation.

Now this plea, as a legal rule in construction, does not depend, observe, on the question, whether the body on whom the obligation is imposed is ecclesiastical or not. It goes on a general principle, that the grant of a special remedy *implies* that such is the only redress intended, and that the party cannot require the obligation to be enforced specifically.

I say this proposition is not sound in reference either to public or private duties—either in the construction of private covenants or of public statutes—in reference to obligations imposed either on individuals or public bodies.

It is easy to see why this special remedy of giving the patron the right to withhold the stipend was introduced in this case—not only on a practical compulsitor on the presbyteries to discharge their duty, but, moreover, and particularly, because, if ordination was once given, (as the civil court could not undo that spiritual act,) it was necessary to provide for the retention of the stipend as a redress, which was at all events to be given, and to declare that the civil right to the stipend at all events should not follow an improper ordination, though the *spiritual character* could not be *recalled*. But though declarations are introduced in statutes, of the character of partial remedies, and intended to *diminish the injury*, arising from wrong, that may have been actually committed in violation of civil rights, yet it is a great mistake to suppose that the wrong may not on that account be *prevented* and the obligation enforced.

I take the liberty, on the contrary, of submitting as an undoubted principle in the construction of statutes, that if an obligation is imposed for the protection and security of a civil right, and to prevent wrong, it is always implied that that obligation can be enforced, else what was the use of imposing the obligation. The *moral* duty on presbyteries arose from the very fact that the right of presentation was in patrons. If the matter is left wholly to their conscience, a declaration of that duty in the *shape* of a civil obli-

gation did not improve or secure the right of patronage, if the civil obligation could not be enforced. But the obligation is made a condition in the institution of presbytery, in *order to enforce the civil right*, and the legal presumption is, according to every analogy of law, and every presumption in the construction of public statutes, that the civil court may enforce *performance of the duty*. I need not waste time in quoting authority upon a point so clear.

Nay, I contend that the very consideration that a special remedy of so peculiar and anomalous a character is given—a remedy which in itself is a great and unquestionable evil,—proves the more clearly that it was intended that the obligation should be enforced by the civil court. The violation of the duty imposed was considered to be so great a wrong and so flagrant a violation of civil right, that it was thought proper to diminish the injury thence arising by entitling the patron to withhold the stipend. But such a result is nevertheless a great misfortune and an evil to the Church, and to the interests of the country; and hence, I say, the stronger is in truth the presumption, that it was intended that the *obligation* should be *enforced*.

But another great principle of jurisprudence here comes into operation against this doctrine, that because a particular and imperfect remedy is given, if wrong shall actually be done, it is not intended that the obligation is to be enforced:—And that principle is, that wherever wrong might be done, whether by the violation of a private covenant, or of a public statute, there is inherent jurisdiction in the Civil Court to *prevent* the wrong. And *thence* arises another presumption, that there is jurisdiction to *enforce* the *obligation* imposed on the presbyteries.

In the *third* place, it is a very singular part of this plea, that if the obligation shall be violated by the presbyteries, and set at nought by the Church, it is for the Legislature to interfere, and not for the Civil Court!! Why, how can the Legislature interfere? The statute is their voice—is the constitutional declaration of their authority, and the constitutional interposition of their power. The Legislature does not summon parties before them who have violated the statute law for contempt of their authority. The Civil Court is in fact the tribunal of the Legislature, for the very purpose of enforcing its laws, and if the Legislature were in this particular case to interfere by another statute, that statute in its turn could only be enforced (if questions arose under it) by the jurisdiction and decrees of this Court.

In the *fourth* place, the best argument which the defenders could have in support of this plea entirely fails them; namely, if they could prove that there was no competency in the civil court to try and decide the point, whether the presentee was illegally rejected:—for if that point was of a character not proper and fit for the cognizance of the civil court in any shape and to any effect, then it

might be urged *more plausibly* that the obligation could not be enforced—I do not say that even then it could be successfully urged, for in enforcing an obligation, you have only to interpret a statute. But this Court *can* try and must try whether the obligation has been illegally violated, in order to decide whether the patron is entitled to withhold the stipend. Now *this* is *jurisdiction* over the proceedings of the ecclesiastical courts, of a far more delicate character, than that, for which I contend, which is simply the enforcement of the duty prescribed by statute, by a decree finding that the presbytery must act in terms of law.

I think there is another consideration which clearly strengthens the general presumption, that the Court is entitled to prevent the wrong and enforce the obligation. Every one of the decisions, giving to the patron, whose presentee was illegally rejected, the right to the stipend, and withholding it from the person inducted by the Church, proceeded upon the ground that the Church *ought not* to have admitted another. Every question which has arisen in all the cases *after induction*, arose out of, and was founded upon, *the point involved* in this action, viz. that the right patron had presented a proper person, and that such presentee *had been illegally rejected*. True—the right to the stipend was often tried in subsequent processes, arising after the ordination of another. But the right was founded on the declaratory decree. If the patron had not presented a *qualified* presentee, there could have been no claim at all. Hence the point now raised was at the bottom of all the cases in which, when a presentee had been refused admission, the stipend was not given to the person inducted. I must then be entitled to try in the *outset* the point, a judgment on which afterwards might give this right to retain the stipend. The very fact, that the Court cannot decide the question as to the right to the stipend, without determining that the presbytery *ought not* to have rejected the presentee, or inducted another, in respect that the patron had not forfeited his right, surely strengthens the presumption, that, *if* appealed to *in time*, the civil court may *direct* the presbytery to do that which it *can find* they *ought* to have done, and to *prevent* them doing that which it *can find* they *ought not* to have done.

Another leading principle of jurisprudence applicable to all such cases, I apprehend to be this, namely, that there *can be no conflict* with the SUPREME CIVIL COURT,—if there is time to prevent the wrong which will produce contradictory results as to the rights of parties. The Civil Court, being the tribunal of the Legislature, specially for enforcing its statutes, is supreme. Confusion between the bodies in the state is never tolerated. Conflict, or inconsistent results from different jurisdictions, can only occur where an irremediable act is done:—But if there is time to prevent such a result,

the jurisdiction inherent in the Supreme Civil Court is for the very purpose of preventing the occurrence of such conflict or confusion.

The only other remark I have to make of a general character, before entering upon the cases, illustrative of the jurisdiction of the Court, is this:—The defenders very wisely have not raised any plea upon the ground that you have not, or cannot have, the General Assembly as defenders, but only the Presbytery. The former body, being annually elected for a special meeting, can have no *persona standi*, and could not be called as defenders. But this point is a very important one for me. I am not trying, in a speculative manner, any general point as to the legislative powers of the Church, in a question with the Assembly. The point arises because their legislative measure *affects a civil right in a particular case*, and is the ground taken for defending a deliverance and procedure of the Presbytery, otherwise clearly illegal, in an ecclesiastical matter which is wholly of a judicial character. Thus it is that the question as to their legislative power arises. The measure of the veto operates in and affects each individual case. The judicial deliverance or disposal of the presentation is thereby regulated, and the defence by the Presbytery of the procedure raises the question as to the legality of that act.

You have, then, the proper parties with whom to try the *general* conclusions of this action: Whether the Presbytery are the right defenders in the conclusion respecting the right to the stipend, is a point to which I shall afterwards advert.

I have noticed the point as to the parties called, for the purpose of disposing of a kind of popular, certainly not a legal, observation, which formed a prominent topic in my learned friend's speech. He said repeatedly, "what are the Presbytery to do? Here is an Act of Assembly. As an inferior Church court they must give effect to it. If the Court shall declare that they must take the presentee on trial, and shall enforce the obligations in this act 1592,—which authority is the Presbytery to obey? And is it not clear that you ought not to place them in this predicament?"

Now, this remark proves too much:—It would exclude the power to prevent in *any* case or to any extent usurpation by the Church: For whatever the wrong, and whatever the usurpation by the General Assembly,—if they were to promulgate an act that the people should elect their ministers,—why each Presbytery might just bring forward this very plea, and try to exclude all redress in the very same way, for they would equally say in every case—"We, the inferior Church Courts, cannot help ourselves: We must obey our ecclesiastical superiors. In doing so, we are surely innocent: At all events you ought not to place us between two such fires as you expose us to—Call our superiors if you choose, or if you can; try the question with them"—And so knowing that the Assembly elected for eight or ten days could not be called, they could thus secure

impunity for any excess of power, however flagrant. This would rather be too easy a method of escaping from the jurisdiction of the civil court.

The answer is plain and obvious.

1. The Church by its own act creates the difficulty which its presbyteries plead, and it must therefore withdraw the measure, which the Court may find to be illegal. Hence this difficulty can be no defence of the wrong complained of.

2. In the *second* place, the remark may be a very good reason why the Court, after pronouncing its declaratory decree, should give the Church time to retrace its steps, and to recal the act of Assembly, and should not arm the party in the interval with the means of bringing the individuals of the Presbytery into any unpleasant predicament with their ecclesiastical superiors; and accordingly we have framed the summons with a view to provide for the propriety of such an arrangement.

But if the Church should not choose to recal its act, then the matter will stand upon the obligation in the statute 1592. The Court will enforce performance of that duty. The Presbytery must obey; and of course, in a very short time, the Church would find, like every other body in the State, that the authority of the law must prevail.

I have now to request the attention of your Lordships to the cases which have occurred, illustrative (1.) of the jurisdiction of this Court, over the Ecclesiastical Courts, in all questions which raise points as to the competency or legality of their proceedings, or their effect on civil rights, and as to the extent to which that jurisdiction has been exercised, and (2.) of the remedies competent to enforce and protect civil rights. Sir Henry Moncreiff seems to think that only two cases had occurred, and as to each of them, he falls into some singular mistakes in point of fact—easily accounted for, even in so learned a person, when he came to deal with law reports. The first case seems to have been wholly unknown to him,—yet it is in some points the most important of any, and affords proof of some principles of the utmost value in the present question.

I mean the Auchtermuchty case, *Moncrieff v. Maxton*, 15th February 1715, Fol. Dict. 2—47, Mor. 9909. Elchies Pat. No. 1. I must show your Lordships the application of this case a little more fully than has been done. The patron, you will remember, had presented—The parish opposed the presentee, and *therefore* the presbytery, without taking on trials, rejected him—Then arose disputes. The first step by the patron was *incompetent* certainly. He resorted to an *advocation* of the process of settlement of the person whom the presbytery meant to induct, as if he could bring it by *review* to this Court.

On this *advocation* a *sist* was, however, in the first instance, granted against the presbytery, stopping their procedure in the mean-

time. This temporary injunction or interdict they chose to disregard, and went on. Then a petition and complaint, early in 1734, for breach of interdict, was presented—I have a copy of it in Lord Dunmore's Collection of Session Papers. The presbytery were brought to the bar of this court and censured for their conduct. Here then is a complete instance of the subjection of the presbyteries to the ordinary jurisdiction of this Court,—an instance showing that you will enforce that jurisdiction when necessary, and will treat ecclesiastical bodies and persons who set at nought your jurisdiction, exactly as you would any other parties whatever; And the instance is the more valuable as a precedent, because the process, in which that temporary interdict was granted, was ultimately found by the Court, and upon good grounds, to be incompetent. Yet as an injunction *had* been pronounced by this Court, it was held that the duty of the presbytery was implicitly to obey, until the matter was finally disposed of by the civil court.

The case then went on in the Church Courts, and they ultimately settled their own nominee. The patron seems not to have anticipated this result: at all events he raised no process of declarator, and did not apply by suspension (the only competent form) for an interdict. But when the person *ordained* claimed the stipend, the patron insisted that he was entitled to retain the whole fruits of the benefice, because his presentee had been illegally rejected:—And so the question with the Church arose. The pleas maintained by the patron have been brought before your Lordships by Mr Whigham. I wish to call your attention to the pleas on which the rejection of the presentee of the patron was supported.

The first printed paper for the minister ordained by the presbytery, (Mr Maxton,) was drawn by Mr W. Grant,—afterwards Lord Prestongrange, and I wish you to recollect that fact in reference to a case alluded to at a subsequent date. He states in the outset, “The minister who is in this case the supposed charger may be permitted to remark in the entry, that he believes this is the first process of this kind that has at any time come before the Court of Session. The incumbent is presumed by law to have a right to the stipend of the parish, and upon procuring his act of ordination or admission, has the privilege of summary diligence for the same, and might therefore plead, that *in possession* he is to be maintained in the enjoyment of the benefice: For the only precedent which the minister has heard of, for a process of this nature, was one at Sir Alexander Cumming's instance concerning the parish of Mary Coulter, which was not a summary action of suspension, but a declarator of his right of patronage of the said church, and that the presentation or settlement made by the presbytery was void. In which process the Lords found that he had right to the patronage of the pa-

“ rish, after the death of his author, but sustained the nullity,
 “ that his right of presentation could not take place during his
 “ author’s lifetime, and thereupon assoilzied the defenders. And
 “ it was upon this point of the validity of Sir Alexander’s title,
 “ that he carried the cause by appeal to the House of Lords.”

He then states, that some discussion had taken place at first as to whether the right of patronage was really with the party who claimed, because the deeds had not been at first produced : But on that point the case did not turn in the Church Courts, as they rejected the presentee in respect of the opposition to him.

LORD JEFFREY.—That is the very point I wish you particularly to speak to. I wished to ask whether, in truth, in that case the presbytery did not reject the presentation,—that is, deny the right,—rather than reject the presentee.

LORD GILLIES.—You have their own account of it in the passage the Dean read the first day. They say themselves the very reverse. I take their own statement as to what they did.

LORD JEFFREY.—I am not sure that the fact yet clearly appears!

DEAN OF FACULTY.—I am about, my Lord, to follow the details of the pleadings for the very purpose of bringing out that fact very fully to the Court. You will remember I attached great importance to the ground on which the rejection took place and was defended, (LORD JEFFREY.—I know you did,) and my present object is to satisfy you of the accuracy of that representation of the case. I have all the papers in this volume before me, and I shall request Lord Jeffrey, if not satisfied, to be good enough to go over them more fully at his leisure.

Then, my Lords, in the paper I am now referring to, Mr Grant proceeds, in the first instance, to state certain objections which had been raised in *this* Court to the validity of the deed of presentation. All the objections, I beg of you to observe, so raised at that stage of the pleadings, were repelled by the Court, as the interlocutors quoted in the case prove. Then in a second or rather supplementary memorial, given in after the exchange of the pleadings written by Mr Haldane, (a very good lawyer, though this Court, at a period of very strange excitement, rejected him on his trials for the Bench,) bearing date January 22, 1735, intituled “ Additional “ Information,” the general point is fully argued. He thus introduces the argument on the general point of jurisdiction :

“ And therefore the charger was extremely unwilling to enter
 “ upon the general points of the legal and civil right ministers
 “ settled in particular parishes by the authority of the judicatures
 “ of this Established National Church have to their stipends,

“ these being matters of great influence in all national concerns,
 “ both religious and civil, in which nobody, whose assistance in
 “ this matter the charger could expect, is willing, or apprehends
 “ himself sufficiently qualified to treat of it in the manner the
 “ importance of the subject matter deserves. But since your
 “ Lordships have ordained the general points to be informed up-
 “ on, the charger shall humbly submit to your Lordships’ consi-
 “ deration such an imperfect state of them as he has been able by
 “ the assistance of his counsel to draw up.

“ And because it is mentioned in page 9th of the suspender’s
 “ information, and in a manner implied in page 4th by some
 “ pretty strong expressions, that the charger declines your Lord-
 “ ships’ jurisdiction as incompetent in this matter, the suspender
 “ thinks himself bound, before he enters on the particular argu-
 “ ments in point of law, to profess his entire submission to your
 “ Lordships’ jurisdiction, as to all and every controversy that can
 “ arise about his legal title to his stipend, to which he pretends
 “ no divine right, other than what the will and providence of God
 “ has allotted to him, by the standing laws and Acts of Parlia-
 “ ment in force in this kingdom, of which your Lordships are un-
 “ doubtedly competent judges.

“ At the same time the charger conceives it will be admitted
 “ that his ordination as a minister of the Church of Christ, his
 “ right to administer sacraments, and perform the other parts of
 “ his function as a minister of the gospel in the parish of Auch-
 “ termuchty, and his being a member of the presbytery and pro-
 “ vincial synod to which the said parish belongs, and of the Ge-
 “ neral Assembly when he is chosen by his brethren for that ef-
 “ fect, are all matters purely ecclesiastical.

“ The single point, then, in debate is, (and of great consequence
 “ it is) whether or not a minister ordained in a particular parish
 “ in this kingdom, by those in whose hands the Church govern-
 “ ment of this nation is established, by the standing laws and acts
 “ of Parliament, has, by the civil constitution and law, a right to
 “ the maintenance, rights, and other privileges, by law provided
 “ to the ministers of the Church of Christ in this kingdom, in so
 “ far as the same is appropriated as a stipend, to the particular
 “ parish for the service of which such minister is ordained.

“ For resolving this question in the affirmative, the charger
 “ humbly conceives, he needs no other argument with your Lord-
 “ ships than simply to set down the words of the 5th Act of Parlia-
 “ ment, 1690, intituled, an Act ratifying the Confession of
 “ Faith, and settling Presbyterian Church Government, in so
 “ far as they relate to the point in hand, of giving presbyterian
 “ ministers a right to stipends, *viz.* ‘ And allowing and de-
 “ claring, that the Church government be established in the
 “ ‘ hands of, and exercised by these Presbyterian ministers who

“ ‘were outed since the 1st January 1661, for non-conformity to
 “ ‘relacy, or not complying with the courses of the times, and
 “ ‘are now restored by the late Act of Parliament, and such mi-
 “ ‘nisters and elders only, as they have admitted or received, or
 “ ‘shall hereafter admit or receive; and also that all the said
 “ ‘Presbyterian ministers have and shall have right to the main-
 “ ‘tenance, rights, and other privileges by law provided to the
 “ ‘ministers of Christ’s Church within this kingdom, as they are
 “ ‘or shall be legally admitted to particular churches.’

“ For if it be true and certain, as undoubtedly it is, that the
 “ civil constitution of this kingdom, particularly by the said Act
 “ of Parliament, which has hitherto not only remained untouched,
 “ but has been confirmed by many subsequent acts of Parliament,
 “ and is made a fundamental point of the constitution of this
 “ kingdom by the articles of Union, commits the government of
 “ this national Church, and amongst other points of church go-
 “ vernment, the care of ordaining ministers to particular congre-
 “ gations, to presbyteries, provincial synods, and General As-
 “ semblies, it cannot be questioned, but that a minister ordained
 “ in a particular parish by these church judicatures, is *legally* ad-
 “ mitted to the office of minister, in terms of the said act, and
 “ consequently, that by virtue of the above recited clause thereof,
 “ that he has a right to the stipend.

“ These points of the church judicatures having the legal
 “ power of admitting ministers to particular congregations, and
 “ that the legal consequence of being legally admitted by them
 “ is a right to the stipend, are so extremely clear and plainly es-
 “ tablished by the said act of Parliament, that the charger hum-
 “ bly thinks he needs have no recourse to ancient laws, nor histo-
 “ ries of past times, to confirm or explain the meaning of them;
 “ or if any commentary be needful, the charger humbly conceives,
 “ the uniform and unvaried practice for nearly forty-five years,
 “ never departed from, or called in question in any one instance,
 “ might be thought sufficient even by the suspender to explain
 “ and ascertain their meaning.

“ There have in the course of this forty-five years occurred se-
 “ veral rises and falls in publick zeal and private affection for the
 “ Presbyterian constitution of Church government, in this part of
 “ the United Kingdom of Great Britain, and some considerable
 “ alterations have been made as to the manner in which the set-
 “ tlement of ministers in particular congregations, should be sub-
 “ jected to the cognizance of church judicatures established by the
 “ civil as well as ecclesiastical authorities in this kingdom; but in
 “ all these alterations and changes in lesser matters, it has in every
 “ instance, since the said 5th Act anno 1690, remained and been
 “ received by all mankind, as certain and indisputable, that a mi-
 “ nister admitted to a particular congregation by the Established

“ Church judicatures, was *legally admitted*, and that a minister legally admitted has a right to the stipend.

“ Though the charger has had the advantage of perusing the suspender's information, upon the general points, Who is to be held as a minister legally admitted to a particular church? And what the legal effect of legal admission is, as to the right of stipend? Yet he confesses he has not been able from any of the propositions advanced by the suspender, in support of his suspension, to form the least objection to the above plain meaning of the 5th Act 1690. However, the charger shall consider them severally in as brief a manner as he can. It is not material in point of law, (though it may be of great consequence in point of expediency, for the peace of the Church and good of religion, and preservation of neighbourly-good-will and harmony in particular parishes,) what the act decimo Annæ, restoring patronages, has said or done, if the above be the meaning of the Act 1690, and that it was not repealed or innovated by the act decimo Annæ, which is hardly pretended. It is very possible,—and thought to be fact, that the said act restoring patronages has missed the point some aimed at by it. Perhaps those who expected great things from it did not fully consider the important alterations which had been introduced with respect to patronages, and the right of settling ministers in Scotland by the said 5th Act 1690; otherwise it is probable it would not have been thought worth while to have passed it into a law, unless some very material thing in the said 5th act 1690 could have been also altered; which, considering how closely it now stands, interwoven with our fundamental constitution of government by the union, was not even then to be attempted. But, be it that what will, there are no words in the said act decimo Annæ that point at making the least alteration in the said 5th Act 1690; and, if for want of that, it be in a great measure ineffectual as to any good purposes expected from it, and productive of much strife, and contention in particular congregations and Church judicatures, and gives no civil remedy, for quelling of these contentions, it is humbly thought the law must be taken as it stands expressed. No doubt to have made that act effectual, it was necessary to have revived some of the stronger sanctions the suspender mentions, namely, charges of horning. But that is not done; and, as is supposed, cannot be done without repealing one of the most substantial clauses of the said 5th Act 1690;—that is in effect one of the greatest articles of the union of the two kingdoms.

“ Besides, the suspender does not pretend that any such compulsory is introduced by the said act decimo Annæ, nor by any other law, or act of Parliament now in force; but he endeavours by other logical argument, afterwards to be more fully

“ considered, to explain away the said plain sense of the 5th Act
 “ 1690, and to maintain one of two propositions, which are both
 “ expressly contradictory to that act, viz. either, that a minister
 “ admitted to a particular congregation by the Presbyterian
 “ church judicatures, established by the law, is not legally ad-
 “ mitted ; or that the legal admission of a minister does not give
 “ him a right to his stipend.”

Then after a variety of remarks on the arguments used by the patron, the paper goes on to enforce the argument so strangely founded on the act 1690, which he sums up thus :

“ The charger therefore hopes he may conclude with some cer-
 “ tainty, that the 5th act 1690 plainly gave church judicature
 “ the power of *legally admitting ministers to particular congre-*
 “ *gations* ; and annexed the civil right to the stipend to such
 “ *legal admission*.

“ If this be the case, while the 5th act 1690 stands unrepealed,
 “ being declared an essential part of the articles of union, it can-
 “ not be doubted, but that a minister settled in a particular con-
 “ gregation by the ecclesiastical judicatures, as the charger is ad-
 “ mitted to be, has a right to the stipend ; and this the charger
 “ humbly conceives to be decisive of the present question, unless
 “ the suspender show by what law or custom the said 5th act 1690
 “ is repealed.

“ It is in vain for the suspender to found on the said act decimo
 “ Annæ, restoring patronages, unless he can show the words or
 “ clause in it which repeal or alter the 5th act 1690, or at least,
 “ that custom has so interpreted the said act decimo Annæ, as to
 “ import a repeal or alteration of the said 5th act 1690. But since
 “ the words of the act decimo Annæ point at no such thing, and
 “ by constant custom, without the exception of any one instance,
 “ ministers admitted by church judicatures since the said act
 “ decimo Annæ, as well as before it, have always had and enjoyed
 “ right to their stipend, whether they were settled in obedience or
 “ contrary to the patron's presentation ; the charger hopes to be
 “ excused, if he testify some surprise to find an attempt made to
 “ explain away at one stroke, contrary to custom and practice, and
 “ without foundation, in the words of any Act of Parliament, the
 “ plain and received meaning and import of the 5th act 1690, now
 “ become, as the charger hopes, a perpetual and inviolable law.”

On this extraordinary plea I need not comment, since my friend Mr Bell expressly said he could not found on the acts 1690 at all. (Mr Bell. Certainly.) The paper goes on thus on another point.

“ The suspender is greatly in the wrong if he imagines that
 “ the case of the stipend is the only thing that can alarm Pres-
 “ byterian Church judicatures, and ministers, and their well-wish-
 “ ers : the seeing a foundation laid for creating unchristian divi-
 “ sions and animosities in every parish, as it becomes vacant, and

“ by intruding even by the authority of church judicatures, ministers upon vacant parishes unacceptable to them, is matter of great regret and sorrow, as well as of clamour and complaint with many. It is a tender point to enter upon the external means of divine Providence, for the advancement of religion and true holiness in the hearts and minds of individuals. But surely affection and respect for the preacher, and spiritual guides, must appear to every body to be one great secondary mean for the increase of religion; and come of the stipends what will, there will, it is hoped, be always found many Presbyterian ministers and people in concern and fears, and under alarm upon that subject; so that though ministers' right to stipend is not taken away by the act decimo Annæ, there is ground for all the clamour and regret has been made about it.”

Again, Maxton's pleading goes on.

“ That your Lordships have a jurisdiction to decide as to the chargers and all other ministers' civil right to their stipend, was never called in question. To be sure your Lordships have right to determine upon the words of the said act 1690, whether a minister admitted by the Church judicatures, established as the legal Church judicatures by the said act, is legally admitted, and whether a minister legally admitted has right to the maintenance, rights and other privileges, by law provided to the ministers of Christ's Church within this kingdom or not.

“ But that as the law now stands, there is no subsisting legal compulsitor, whereby civil courts can compel presbyteries, or other church judicatures, to admit ministers upon presentations from patrons to vacant parishes, the suspender himself has in effect fully demonstrated, and needs not attempt to put it on the charger as a doctrine of his, that should be resented by your Lordships; for the suspender has mentioned in his information, page 7th, that Acts of Parliament made from the 1606 to the 1641, did introduce stronger sanctions, namely, letters of horning, &c. and from thence two observations necessarily follow, 1st, that before these acts there were no such strong sanctions; 2d, That since these acts are each and every one repealed and made void, (as they are *nominatim*) by the said 5th act 1690, there remain no such strong sanctions now in being.

“ The very mentioning these acts, and the period when they were made, and when they were repealed, proves that before the time of these acts, and since they were repealed, there is not, and was not any legal compulsitor, whereby civil courts can in this kingdom compel ecclesiastical judicatures to admit ministers to vacant congregations upon presentations.”

Then the terms of the act 1567 are founded upon as establishing finality to all effects for the decisions of the Church Courts. And the paper proceeds: “ The suspender next proceeds to dis-

“ distinguish between the power of judging of qualifications, and
 “ judging of the right of being admitted a minister, who is not
 “ denied to be qualified. In confirmation of this, the suspender ap-
 “ peals to the authority of the history of these times, and observes,
 “ that the Popish bishops and clergy continued then in their bene-
 “ fices; and were the only clergy authorized by law; that, therefore,
 “ the said act gave the reformed clergy the power of the examination
 “ and admission of ministers, in opposition to the said Popish clergy,
 “ but not to the civil magistrate.

“ Replied, That the charger can find no place for the disjunction
 “ between the right of judging of the qualifications of ministers,
 “ and judging of their admission, either in the words of the act,
 “ or in the histories of that time; for both qualifications and ad-
 “ mission seem to be equally subjected to the cognizance and final
 “ determination of Church judicatures. As to the words of the
 “ act, the first clause of it, without the additional proviso, con-
 “ cerning the method in which the effect of a patron's presentation
 “ should be finally determined upon, imports rather more than the
 “ suspender allows, according to his distinction, to both the first
 “ part of the act, and the adjoined proviso. The first clause esta-
 “ blishes the power, not only of examination, which relates to the
 “ qualifications, but of admission, which is a distinct thing, and
 “ can only relate to the *choice* of the person to be minister in a par-
 “ ticular congregation; and though the patron's right of present-
 “ ing, that is, of *offering*, instead of a congregation, a minister to
 “ the Church judicatures to be admitted, yet the effect of that pre-
 “ sentation is plainly and ultimately committed to the judgment
 “ of the ecclesiastical courts. Had it been otherwise, there was
 “ an absolute necessity for having then introduced some of the se-
 “ verer sanctions which afterwards took place, to enforce the effect
 “ of presentations; but nothing of that kind having been done, it
 “ is plain the ultimate judgment of the effect of presentations, how-
 “ ever arbitrary and tyrannical it may appear to some, was by the
 “ civil authority committed to the ecclesiastical judicatures.”

On the above passage I may only observe, that while the object of the plea is clear enough, there is certainly considerable confusion in the expressions employed.

To the patron's plea on the act 1592, the charger makes the following answer.

“ Replied, 1st, It is admitted that the act 114, anno 1592, does
 “ contain a clause obliging the presbyteries to admit qualified mi-
 “ nisters presented by his Majesty or other laick patrons. But
 “ 1^{mo}, That plainly shows, as the charger has contended, that by
 “ the act 1567, there was no such obligation on presbyteries, but
 “ they had an absolute and full power to reject or receive them as
 “ they pleased.

“ Replied, 2^{do}, The said clause, though it introduces an obli-

“gation upon presbyteries, yet it introduces none of the *stronger*
 “*sanctions by charges of horning* ; these were reserved to uther
 “times, not so much to the taste of those who were our legisla-
 “tors in the years 1592 and 1690, viz. to the 1612, when the sus-
 “pender’s stronger sanctions were introduced.

“Replied, *3tio*. Whatever was in that clause obligatory on pres-
 “byteries, that, with the whole 114th act, anno 1592, was rescind-
 “ed by the first act 1612 ; and though all the rest of the said
 “114th act was revived by the 5th act 1690, yet that obligatory
 “clause on presbyteries is excepted from the revival : And, there-
 “fore, it can have no effect in the present question, other than to
 “explain, as is above observed, that the true intent and meaning
 “of the 5th act 1690, was to commit to the Church judicatures a
 “full power, as to the legal admission of ministers to particular
 “vacant congregations, independent of patrons and all civil powers,
 “and to annex to such admission a legal right of stipend.”

The Court then considered the case on these pleadings, after the person had been ordained and settled by the Church. Their judgment was 14th February 1735, “That the right to a stipend
 “is a civil right, and therefore that the Court have a power to cog-
 “nosce and determine upon the *legality* of the *admission* of minis-
 “ters *ad hunc effectum*, whether the person admitted shall have
 “right to the stipend or not.” You will observe from the conclud-
 ing words that the proposition affirmed by the Court went further
 than the affirmation of their right to judge of the legality of the *re-*
jection of the patron’s *presentee*. Another being admitted and or-
 dained, the Court said, though the ordination is ecclesiastical, yet
 we will judge whether the person so admitted has been legally ad-
 mitted : And thus they sustained their jurisdiction. Then arose
 the next question,—Was the presentee of the patron legally rejected
 on the ground of the opposition of the parish :—If he was, then, as
 the patron adhered to him, he had forfeited his turn, and the nominee
 of the presbytery would have been held to be legally the minister.
 Now subsequent printed arguments were given in on this second
 question. The memorial for Maxton on this point bears date
 February 19, 1725. My Lord Jeffrey will see that *this* was the
 paper in which the ground of *rejection* by the presbytery was to be
 stated and defended. The argument in the preceding information,
 on which the judgment of the 14th February proceeded, was di-
 rected to the point, that the person admitted and ordained by the
 Church *must be entitled* to the stipend ; and that the Court could
 not consider the legality of *his admission*. That was disposed of :
 —And then, compelled to discuss that point, the presbytery and
 their nominees say *he* was legally *admitted*, because the presentee of the
 patron was *legally rejected* on a ground proper and competent for
 the Church to proceed upon, and so the patron had lost his right.

“As to the rejecting the suspender’s presentee, it was easy to

“ show, that in the admitting or refusing probationers to churches,
 “ no civil Court is to be supposed fit to review their sentences ; for
 “ the Church is lawgiver as to these qualifications, necessary or
 “ proper. They have rules of evidence peculiar to themselves.
 “ As civil courts require less evidence than the criminal, so the
 “ Church requires less than either. Where the question is, who
 “ is the most proper teacher to a parish ? they are supposed by
 “ law the only competent judges of the probationers having the
 “ qualifications which their acts make necessary ; they are best
 “ acquainted with the state of the Church, and know best what is
 “ for the good of it, which is often their reason for refusing pre-
 “ sentees to certain parishes ; and they act very wisely in so do-
 “ ing. On these accounts and others, no civil court is fit, nor by
 “ law is supposed capable of reviewing their procedure. And by
 “ the British Act 1719, anent the oaths to be taken by the mi-
 “ nisters of this Church, in the end of which the presentees are
 “ ordered to accept within six months of the vacancy, it is enact-
 “ ed and declared, that nothing herein contained shall prejudice
 “ or diminish the right of the Church, as the same now stands by
 “ law established, as to the trying the qualities of the person pre-
 “ sented to any Church or benefice.”

Then follows immediately the long passage which I quoted on
 Tuesday, and which states expressly *the* ground on which the
 presentee of the patron was rejected. I need not read it again.
 It puts and defends the rejection expressly and solely on the
 ground of the opposition of the parish, which was, they said, suf-
 ficient without any opinion of the presbytery on his qualities.

But there is another passage even more explicit, which seems to
 me to be the very plea on which the Veto Act is defended. I beg
 your attention to it ; it is in the conclusion of the Memorial.

“ Your Lordships will observe then, that the Church is exclu-
 “ sive absolute judge of the qualities of the presentee, and of the
 “ evidences of his having the qualities the Church requires ; and
 “ therefore, their judgment concerning the presentee cannot be
 “ found illegal. And the foresaid Act 1719 mentions not only
 “ their power of judging of the presentee to a church, but to a
 “ benefice also : So before the Court can find that the suspender’s
 “ presentee was illegally rejected, it must find that the quality
 “ which the Church has immemorially required, and which is
 “ contained in their ancient Books of Discipline, viz. That the
 “ person to be admitted minister of a parish, his gifts must be
 “ edifying to them, which they declare by their votes for him at
 “ the moderation, that this quality is unnecessary, and unjustly
 “ made necessary by the Church. But then it is evident the
 “ Church’s power and right of judging of the qualities of the pre-
 “ sentee is diminished, contrary to the foresaid declaratory act

“ 1719 ; and then a power of reviewing the ecclesiastical regulations is set up, which was unknown at the Union, which renders the jurisdiction of the Church, as then established, sacred and unalterable, and declares it an essential and fundamental condition of that treaty, and of which new jurisdiction, no act of the British Parliament makes the least mention ; yea, lest the Act *decimo Annæ* should been suspected to import that, the act 1719 declares the contrary.”

This passage clearly proves that the presbytery rejected the *presentee*. But further attend to the plea. They say, the Church is entitled to declare in any particular case,—ought to hold in all,—that the presentee must be edifying to the people,—he cannot be so if they vote against him,—hence we rejected the patron’s presentee. Now what is this plea but the defence of the Veto Act : With this single distinction, that in the Auchtermuchty case the point still occurred as a *cause* for the opinion and *judicial determination* of the presbytery in the particular case, and then by review at the instance of either party to the superior Church Courts. The Veto Act leaves the presbytery no choice, and precludes them judging even of this objection. It prescribes rejection. But equally in the one case and the other the presbytery refuse to take on trials. This they did in the Auchtermuchty case, and they justified their refusal on the ground stated.

Then the Court on these pleas found, “ That presbyteries refusing a presentation duly tendered to them, in favour of a qualified minister, *against* which presentation *or presentee* there lyes no *legal* objection ; and upon admitting another person to be minister, the patron has right to retain the stipend, *as* in the case of a vacancy : and therefore finds the reasons of suspension relevant,—and supersedes advising the other points in the cause till Tuesday next.”

A very long Reclaiming Petition, praying for an alteration of these two judgments, drawn by Mr Grant, was then presented to the Court. After the narrative of the proceedings, this petition bears. “ The petitioner is extremely concerned, that an occasion has been furnished from his particular cause, for your Lordships pronouncing these interlocutors ; which in case they are founded in the law, are yet so *new*, and so different from what has been hitherto understood and practised, that they are likely to have the same consequences as if a new law or statute had been made, to the same effect and purpose with what by these interlocutors is declared to be the law already standing :—and as one of these consequences is likely to be, an alteration or a very considerable diminution of the privilege and jurisdiction hitherto enjoyed by the Church, of being the sole judges concerning the admission of ministers, as well those presented by laick pa-

“ trons, as otherwise ; the petitioner, therefore, conceives himself
 “ obliged to lay the case again before your Lordships, in the man-
 “ ner which the forms of the Court allow ; and he hopes that the
 “ nature of the case will excuse him for giving this trouble, not-
 “ withstanding that he can hardly flatter himself that he can offer
 “ any thing so new or forcible, as to persuade your Lordship to
 “ alter these interlocutors ; because they were pronounced after
 “ very full debate among your Lordships, and though the Court
 “ was not unanimous, yet it was far from being equally divided in
 “ opinion.

“ These two interlocutors contain propositions that are hardly
 “ different, but in effect one and the same, with this addition only,
 “ that the second affirms a particular remedy to be competent to
 “ the patron, by retaining the stipend as in the case of a vacancy.
 “ But the general proposition included in both interlocutors amounts
 “ to this, that a minister admitted to a particular parish by the
 “ Church, as by law established in this part of the United King-
 “ dom, may yet be deprived of the stipend or fruits of the bene-
 “ fice by the Court of Session, in case your Lordships shall find
 “ that there was any erroneous step in relation to the patron, by
 “ refusing to admit another person by him duly presented.

“ In opposition to which, the petitioner does humbly insist,
 “ since he becomes obliged to plead this general question, that
 “ the power of admission of ministers, even those presented by
 “ laick patrons, and of trying their qualifications, and admitting
 “ or rejecting them accordingly, as they shall be judged qualified
 “ or not, is by law lodged in the presbyteries, and other judica-
 “ tures of the Church only, without being subject to any review
 “ or control of any civil court ; and consequently, that if the
 “ Church shall finally refuse admission to the presentee, and there-
 “ after settle that parish with a different person, that he who is
 “ so admitted is entitled to the maintenance, and other rights and
 “ privileges by law, provided to the minister of that parish.

Again, the petition bears,

“ That patrons have now, and at several former periods since
 “ the Reformation from Popery, had a right to nominate and pre-
 “ sent qualified ministers to vacant churches, and that the pres-
 “ bytery is obliged to receive and admit the person so presented,
 “ is undoubtedly true ; but the question at present is not concern-
 “ ing the *right*, but the *remedy*, and whether there be such a re-
 “ medy competent by law, as that in a case of a supposed wrong
 “ done to the patron by the Church, the Court of Session can
 “ withhold the stipend from the minister who is admitted by the
 “ Church ; and the petitioner conceives that such remedy is not
 “ competent by law, but that the sole remedy which the patrons
 “ have, is by prosecuting their right, first before the presbytery of

“ the bounds, and thereafter before the other superior judicatures
 “ of the Church, who have *power finally to determine* thereupon.

“ Nor is there any absurdity in this constitution, although the
 “ Church in some sense may be said to be *party* as well as *judge*
 “ in these questions, because failing the presentation of a qualified
 “ person by the patron, the right of presenting devolves to the
 “ Church itself. For there is no sort of inconsistency in this:—
 “ the law presumes that every power that it entrusts with a juris-
 “ diction will do justice. The case is much the same as when a
 “ civil court determines in a question concerning the extent of its
 “ own power and jurisdiction, which no doubt is always done ac-
 “ cording to what appears to that court to be law, without any re-
 “ gard to their own concern in the question, which is no proper
 “ interest of theirs, such as can render them parties, or at all un-
 “ qualified to be judges in the case.”

Then an argument is urged with great anxiety on the act 1567,
 c. 7, as giving “ exclusive and final jurisdiction to the Church.”
 Then on the act 1592 it is said, “ To these objections the peti-
 “ tioner does humbly offer for answer the following considerations;
 “ and, 1st, It is to be observed, that the said first Act of the Par-
 “ liament 1592, at the same time that it declares presbyteries
 “ bound to receive and admit qualified ministers presented by pa-
 “ trons, does also give *full power to them to put order to all mat-
 “ ters and causes ecclesiastical within their bounds, according
 “ to the Discipline of the Kirk.* And the suspender’s procurators
 “ admit it to be a part of this jurisdiction, that the presbytery has
 “ the sole power of judging the qualifications of the minister pre-
 “ sented; and consequently, if they judge him not qualified, the
 “ power of conferring the benefice falls to themselves for that time.
 “ If, indeed, they shall reject a person without a sufficient reason,
 “ it will no doubt be an injustice, and wrong both to the patron
 “ and presentee; and so is every erroneous or unjust sentence,
 “ an abuse of the power committed to the judge by law; and there
 “ is no doubt that errors may happen in courts of every kind, so
 “ long as the judges are fallible men. But from this it is no con-
 “ sequence that the acts of ecclesiastical jurisdiction, in matters
 “ competent to them by law, should be subject to any amendment
 “ or control by the authority of the civil courts.”

Again,—“ Another main objection urged for the suspender, the
 “ patron has been, that the power and authority given to the
 “ Church by the several statutes urged in behalf of the petitioner,
 “ did import no more, but that the Church judicatures are the final
 “ judges of the qualifications of presentees; but not, that they
 “ have an arbitrary power of admitting a qualified person or not;
 “ and that the patron has no remedy.

“ For this it is answered, 1st, The statutes will not bear this

“restricted and limited interpretation. For the 7th Act 1567 concerns not only the examination, but the admission of ministers, whether presented by laick patrons or otherwise; and in case of the Church’s refusal to admit the person presented, the patron may appeal to the General Assembly, by whom the cause being decided shall *take end* as they discern and declare; that is, they have the final decision, whether the person presented shall be admitted or not. If they shall reject him arbitrarily, and without a sufficient reason, it will no doubt be an unjust sentence, and contrary to law; but the law does not presume that any power or judicature, which it does intrust in the last resort, will do injustice; and if that should happen at any time, there is no remedy; and there could be none, but what would be equally liable to the same possibility of error. In such cases as are judged by the last resort of any kind, it is in a special manner true, that *res judicata pro veritate habetur*.

“And in like manner the words of the 23d Act 1690, giving the like jurisdiction to the Church, are general and comprehensive, that by the judgment and determination of the presbytery, the admission or entry of every minister to a particular parish, is to be ordered and concluded, which certainly means somewhat more than the examination of the personal qualifications of him who is presented, and particularly it must signify a power of cognition of his fitness or unfitness for the particular parish or congregation to which he is proposed, and of the reasons that may be offered by the disapprovers against the admission of the person presented.

“In the next place, supposing, for argument sake, that the jurisdiction given by law to this Church, was no more, but to be final judges of the qualifications of the presentee, it would come to the same thing in effect;—for the just and proper sense of a *qualified person* must signify, qualified for the particular congregation to which he was presented. The term in the canon law is *Idoneus*, and it is certain that a man may be qualified or *Idoneus* to be minister, for example, in the Island of St Kilda, who is extremely unfit to be minister in other more public places, amongst persons of condition and learning; and if the Church has this power finally, which the suspender admits, then how is it consistent with this, that any civil court can review their proceedings, or cognosce, whether the presentee was refused, for *sufficient reasons*, or not? which cognition would indeed be necessary, in order to control the proceedings of the Church.”

The question put by one of your Lordships has shown me the propriety of quoting all these passages at length. Your Lordships must all see the direct application of this case, if my account of it is correct. And I apprehend that this very full account of it—I shall be glad to send the volume to such of your Lordships as

choose to go through it—must satisfy all, that the *presentee* was *rejected* by the Presbytery on the ground I have stated, viz. the opposition of the parish, and that the Court held that they had jurisdiction to try the legality of the rejection on this ground, and of the admission of another—that they decided that it was not a legal ground of rejection, and gave the redress the patron asked :—all the redress which the state of the proceedings, at which he appeared to the jurisdiction of this Court, rendered possible.

After all these points had been thus solemnly decided, I am aware that a flaw in the patron's right was at last discovered. But that accidental result is immaterial to the present question. On the application and importance of this decision I need not now dwell, after all I have said.

One observation, however, I wish to make. You will observe that this case of Auchtermuchty did not present a case in which the Church inducted *one* out of *two* *presentees* presented by *different* patrons, between whom there existed a *competition* for the civil right, and so by the induction, before the civil right was disposed of, practically decided the matter for that vacancy. That was not the state of the fact. It was a case in which the Church rejected a *presentee* (there being no competition for the right of patronage) on the ground, as I have shown, of general opposition by the parish—that is, refused to receive and admit the presentee—and then inducted another of their own authority. With reference to the Lanark case, I beg of you, when I come to it, to keep in view the fact I now mention, that this earlier case of Auchtermuchty was not a case of competing presentations—on one of which, a settlement was made, before the civil court decided the point of right.

The next case is Hay v. Presbytery of Dunse, February 25, 1740. Falconer, Vol. ii. p. 68. Morison, 9911, 5th Supplement, 768.

I do not propose to add much to what Mr Whigham said on this decision. The case, you will remember, was, that the presbytery maintained that Hay of Belton (apparently holding the right to the patronage) was only a trustee for Hay of Drummelzier, a nonjuring jacobite, and so not qualified to present; and refused to settle his presentee. Then Hay brought a declarator against the presbytery, the conclusions in which were read to you, and were analogous to those in this Summons: The Lord Ordinary sustained Belton's right: The presbytery reclaimed to the Court and pleaded (Mor. 9912.)

“ Pled in a reclaiming bill—Matters proper for the cognition
 “ of a presbytery or other ecclesiastical judicature, and by them
 “ determined, cannot be brought under review before a civil court.
 “ The trial and admission of ministers belongs to the Church, as is
 “ declared by Act 7th, Parliament 1567, by which patrons are ap-

“ pointed to represent to the superintendent with an appeal competent to the superintendent and ministers of the province, and from them to the General Assembly, where the case is to take end. This right was always enjoyed by the Church of Scotland, excepting that in times of Episcopacy, letters of horning were granted against the bishop to collate, but there was never any such practice competent under presbytery. The presbytery had, notwithstanding the presentation, appointed a moderation, the affirmance or reversal of which sentence was pending by the pursuer's own appeal before the synod; so that they are *functi* till a determination, and cannot admit the presentee, if the Lords should declare the patron's right; as neither can they proceed to a settlement if they should assolvie from the declarator, when perhaps the synod will reverse their sentence.

“ The petitioners have judged that Mr Dickson has not been duly presented, and apprehend, for the reasons given, their judgment not liable to be reviewed by any civil court; but if it were, they say that the pursuer's right is derived from Lord Blantyre, who derives from Drummelzier; that Blantyre presented the last minister, but subsequent to his title Drummelzier obtained a decret for the vacant stipends; so that the presbytery could not but consider him as patron, and he being unqualified to present, the conveyances are a contrivance to present by the interposition of another person.

“ The presentee was not qualified by taking the oaths before his license; but to this it was *answered*, that he had qualified and got his license renewed.

“ The presbytery acknowledged the competency of a declarator of a right of patronage before a civil court, but apprehend they are not the proper contradictors, as pretending no right to the patronage of any parish.”

The opinion of the Court is thus reported:—

“ *Observed*, that a right of patronage was a civil right, and might be declared; as also it might be declared that the patron had presented in due time; in which action, the presbytery were the proper persons to be called, as having right after lapse of six months to present or to settle *pleno jure*; and the Court would not take notice of what method they chose, or making the settlement, whether by moderation of a call or otherwise, since that was not prescribed by the law: That the declarator nowise affected their *power* of *trying* or *admitting* a minister; and though taken ill by the presbytery, was rather a favour to them, in that by being brought before a final settlement, it gave them an opportunity of being satisfied whether there was here a regular presentation, that they might not by mistake make a settlement in opposition thereto; the consequence of which would be, that the minister settled would have

“no legal title to the benefice, as was found in the case of the minister of Auctermuchty, though in that case, happily for the minister, there proved to be a defect in the patron's title: That the patron had deponed he was no trustee, and if he were it did not hinder him to present.”

Lord Monboddo's report of it (he was then at the bar, but not counsel in it,) must be clearly erroneous in stating, that the Court thought the presbytery were not the parties with whom to try the point as to the patron's right to the stipend. They are unquestionably entitled to defend in all cases the benefice, whether vacant or filled, and the instances of their title being recognized to that effect are innumerable. Indeed, their title to resist the patron's right to retain arose also out of their own claim to the *jus devolutum* for that turn.

The import and effect of the judgment of the Court will best appear by the prayer of a Reclaiming Petition to the Court to alter the judgment.

“May it therefore please your Lordships, in respect of the premises, to review the Lord Ordinary's interlocutor, and to find,—*1mo*, That no action is competent before your Lordships for reversing the judgments of a Church judicature in the settlement of a minister in a vacant parish: And *2do*, To find that a declarator of a right of patronage against a presbytery or synod is not properly brought, and that the presbytery and synod are not proper defenders in such an action: And *3to*, To find that the qualifications of a presentee to a vacant church are not the proper subject of a declarator before a civil court in Scotland: And *4to*, That it is not competent to your Lordships to grant an injunction to the Church judicatories in Scotland not to settle a minister in a vacant parish: And therefore to assoilzie the presbytery of Dunse from this present declarator. According to justice, &c.”

The pleas stated in support of this application were almost identically those maintained by the present defender.

The case went by appeal to the House of Lords, when it was discovered, on reference to the statute as to patrons not qualifying to government, that the right of presentation in such cases fell to the Crown, not to the presbytery,—a point which neither of the parties wished, I suppose, to state in the Court of Session,—and the House of Lords sent back the case, that the Crown might be called as a party, deciding all questions to be entire. You will find the judgment in Craigie and Stewart's Reports, p. 478.

3. The third case is the Culross Case,—*Cochran v. Stoddart*, &c. There are three reports of it in different stages.

(1.) November 19, 1748. Folio Dict. iv. p. 49. Morison, 9909. Kilkerran *voce* Patronage, No. 2. The patron whose presentee was rejected on grounds which I will immediately notice,

adrocated the process to this Court, and, as in the Auchtermuchty case, that was found to be incompetent, of the date I mention.

(2.) Again, January 21, 1749. Folio Dict. iv. p. 59 and 54. Morison, 9909. Kilk. Pat. 3. The presentee of the patron, Cochran of Culross, was not popular: So, the vacancy being in a second charge, and since the revolution no one having been settled on a presentation, the presbytery thought they might reject the presentee, and moderated a call at large, as if the right of patronage did not apply to a second charge, and they ordained another so elected. The Court found, of this date, that it did, though the church had been built by the contribution of the heritors.

Then arose the competition as to the stipend:—The *patron* concluding that he was entitled to it, on the ground of the illegal rejection of his presentee:—The *minister* who had been ordained contending that the settlement by the Church was conclusive to all effects, and that the stipend must therefore belong to him. This (3d) report is June 26, 1751. Stoddart v. Cochran. Fol. Dict. iv. p. 52. Falconer, No. 213, p. 256. Morison, 9951. Elchies, Pat. 4.

I see that Sir Henry Moncreiff was under the belief that the minister ordained did *not* try the question, and left the stipend to the patron without appearing. Such a mistake is not surprising, as he may not have had access to the law reports,—but of course the mistake makes all the difference (to use a common phrase) in the importance of the case. Mr Stoddart, the minister inducted and ordained, insisted most strenuously for the stipend, as the inalienable right of the person ordained, and contended that this Court had no jurisdiction to inquire into the legality of his admission.

In this case of Culross also, you will observe, that there was no case of competing patronages. The case involved all the points which arose in the present cause. The session papers are in the library. In Stoddart's information, drawn by R. Craigie (afterwards President) I see the argument for the finality of the judgments of the Church Courts in respect of the act 1567, is strongly revived and urged. Sir Henry Moncreiff says, that the presbytery settled Mr Stoddart during an appeal to the Assembly, and hence that this might be a reason why the minister, aware of that objection to the regularity of his settlement, felt it to be prudent not to appear. There is a *second* mistake here, for I see it stated in the papers, that the Committee of Bills in the Assembly held the appeal to be irregular in form, and refused to enter it as competent.

The Court sustained the right of the patron to the stipend. There is a full note by Elchies of the case, which is important. *He* alone was against the judgment. He states, Elchies's Notes, Patronage, No. 4. "The case was reported by Lord Justice-Clerk, "and I was of opinion, that Mr Cochran's right not being cloth-

“ed with possession, and being disputed both by the Crown and the town, the presbytery was *not obliged to wait more than two years till he cleared his right*, and therefore was for sustaining the defence. But the Lords thought that the opposition to Mr Cochran’s right was affected and spirited up by the presbytery, and therefore found that the patron had right to the benefice, and preferred him to the minister *me renit*. Justice-Clerk and Leven did not vote. Pro, were Minto, Drummore, Strichen, Kilkerran, Murkle, Shewalton, Woodhall.”

Elchies gives, you will observe, as his reason, that the presbytery were *not obliged to wait*, keeping the cure vacant and the parish without a minister, till the patron settled the question of civil right, which he should have cleared before the vacancy arose. This is obviously a very insufficient ground. The Church Courts are either entitled *conclusively* to decide the whole matter by the ordination, or they are not. If they have such power,—if the settlement makes the person minister to all intents and purposes, and the patron has no redress and no remedies, then clearly the rights of minister ought in *all* cases to belong to the person so settled, and the civil court could not in any instance inquire into the grounds on which they proceeded. If they have not such power, then they ought clearly to wait until the question in the court of law is decided. To say that they are not to keep the parish *long* vacant, is no ground at all for obtaining jurisdiction, which, on that supposition, they otherwise had not, to dispose conclusively of the matter. And, indeed, it was a very feeble ground to take up on behalf of the Church, considering that if any question occurs in the *ecclesiastical* procedure, a settlement is often delayed for years by the endless succession of appeals stopping all procedure, and each only annually disposed of by the Assembly.

This is another case in which the Court repelled the plea maintained by the Church, that their decision was to determine all questions whatever, and that the rejection of the presentee, no matter on what ground, was conclusive against him and the patron. The stipend was found to belong to the patron, and was thus separated from the person ordained to the cure.

4. The Lanark case came next. Dr Dick *v.* the Crown Factor,—the Crown being patron. July 29, 1752, Fol. Dict. iv. p. 52. Morison, 9954. Select Decisions, p. 22. Fac. Coll. March 2, 1753. Elchies, Pat. No. 6.

In this case the judgment of *this* Court went in favour of Dr Dick, the minister, as to the right to the stipend. He had been ordained and settled by the Church,—being one of two presentees nominated by the two parties competing for the patronage. He was *inducted* by the Church pending the suit. The Court ultimately decided that the right of patronage was vested in the Crown. Then arose the competition for the stipend, which the Crown

claimed, as the patron whose presentee was illegally rejected, and because Dr Dick was illegally admitted. This Court decided against the Crown. The judgment went on a special ground, which I will immediately explain : But it was *reversed* in the House of Lords, and in conformity with the other decisions, the patron (the Crown) was found entitled to the stipend, on the ground that the settlement of Dr Dick, or of any other than the presentee of the true patron, was invalid, and could vest no right which the Court could recognize. Sir Henry Moncreiff admits that this decision of the House of Lords and in the Culross Case, had settled the point, that the ordination did not decide the rights of parties, or give right to the stipend. But he questions the principle of the judgments, and in doing so falls into some great mistakes in point of fact, which it is material to my argument to point out, as I shall be enabled thereby to bring out more fully the force of the train of decisions I am now explaining. In correcting mistakes which he fell into in regard to the decisions of courts of law, I do not think that I shall throw any disparagement on the authority of the Treatise to which, generally, I wish to refer the Court for much valuable information. These were mistakes which only a lawyer could have avoided. Sure I am that, in pointing them out, I am not actuated by any motive inconsistent with the veneration and respect I always entertained for his character, or with the gratitude I shall ever feel for much personal kindness received from him by me in earlier life, of which I had just reason to be proud.

In wishing to claim great authority for the judgment of the Court of Session in Dr Dick's case (reversed as I have said on appeal,) Sir Henry Moncreiff believed and says, that this Court was *unanimous*. This is a great mistake. There were a succession of judgments, one altering the other on each occasion, and only by majorities on each occasion of one, owing to the absence of some of the Judges and similar accidents.

This Lanark case was a proper case of competing presentations from two patrons, Lockhart of Lee and the Crown. The question went on long in this Court between the two patrons—the Church got impatient of the delay, and settled the presentee of Lockhart, Dr Dick :—Curiously enough *against most violent opposition by the people*, which even occasioned great tumult and much rioting in the town, the opposition to him being universal in the parish, (notwithstanding his great talents and eloquence) : But he was the favourite of the presbytery, and they settled him, disregarding equally such opposition on the one hand, and, on the other, the dependence of the civil action in which the right of patronage was to be decided.

Sir Henry Moncreiff has an ingenious attempt to make out that the judgment of the House of Lords was the more defensible, because

this was a case of competing presentations—because it might be said, therefore, that the Church *ought* in *such* a case to wait the result of the civil action, and hence that, in *such* a case, there may be a *special* ground for denying effect to the ordination by the Church, and for disallowing the finality claimed for its procedure and decision, which would not apply to other cases :—And so Sir Henry Moncreiff wishes to argue, that it may be a question (he does not carry it further than to say that it may be a question) whether the decisions of this Court apply to any other case than a settlement made by the Church when there are competing presentations, and without waiting the result of the competition for the civil right of patronage. It is very remarkable that this view is *exactly the opposite* view from that which was pleaded, and relied upon by the eminent counsel for Dr Dick, and from the view adopted by the majority of this Court in deciding in favour of Dr Dick. It is a very remarkable contrast, which the pleas on the part of the Church in that well known case—so long and anxiously and keenly contested—exhibit to the theory which Sir Henry Moncreiff has brought forward in order to limit, if possible, the application of the principle of that case. The report in the Select Decisions—See Mor. p. 9954—bears—“ *Answered* for Mr Dick ; There is a wide difference betwixt the case of a single presentee and that of competing presentees. In the former case the presbytery cannot overlook a presentation, and settle a church by a popular call, which would be a gross contempt of the laws of the land. Such a settlement is declared *null by the Act 1592*, and justly. This was the case of the late settlement of the parish of Culross, to which this Court did apply the said Act 1592, finding that Mr Cochran of Ochiltree, the undoubted patron, whose presentee was rejected by the Church Courts, was entitled to retain the vacant stipends. But in the case of competing presentees, these courts who are bound to settle the parish must judge the best way they can in the competition ; and though they should err in point of judgment, such error may be redressed, *rebus integris*, but cannot have effect to annul a settlement regularly made. To this case the Act 1592 is not applicable.”

Again—The same plea is thus stated in the Faculty Report, p. 9957. “ *3tio*. The sanction of the statutes above quoted cannot apply to the present case ; because the presbytery complied with the direction of the law ; and *admitted the presentation of the only legal patron*, so far as could appear to them. The law, indeed, requires that the presbytery should admit the person presented by the patron ; but as it has given the presbytery no remedy whereby they can bring the rights of competing patrons to trial in the civil court, it must therefore be implied in the jurisdiction given them by law of admitting the presentee of the lawful patron, that they must have a power of trying the rights of competing patrons to the effect of ex-

“plicating that jurisdiction. And this judgment of the presbytery upon the point of civil right must determine the settlement of the Church, and put an end to the vacancy ; and consequently to any claim for the benefice as vacant *pro hac vice*. It will not, indeed, preclude the party aggrieved from having his right afterwards tried in the civil court ; but still it must determine the right to the effect of supplying the present vacancy ; and if it were otherwise, this absurdity would follow that though the law has required the presbytery to settle vacant churches upon the presentation of the lawful patrons ; yet the presbytery cannot comply with the law wherever a competition happens about the patronage. Neither the presbytery nor the civil judges can force the parties to a decision of their rights, and so by this means, vacancies may be continued for ever. And as to the cases of Auchtermuchty and Culross, they are in many respects different from the present, and consequently the decisions therein given will not apply.”

Elchies thus states the point, and the opinions of the Court, in his notes, (Elchies' Notes, p. 325.) “ The Crown's factor claimed *because the Crown had duly presented*, and the presbytery *had not given obedience*. The minister claimed as *being lawfully ordained*, and though the Crown had presented, and is now found to have the best right for ought yet seen, yet that was not till after he was ordained, and that without any hurry, the vacancy having subsisted for two years and two months ; that Lee had produced a charter under the Great Seal in 1647, containing *novodamus*, since which there had been no opportunity of presenting till now, and Lee has had the only possession that could be had by gifting the vacant stipends for the use of the minister's widow in 1708, and though that charter was found insufficient, being only passed in Exchequer without any warrant from the Crown, yet the presbytery did right finding him in possession to obey his presentation, and could not let the Church remain vacant for years till the point of right should be settled ; and the rule in the canon law is, in case of such disputes in patronage, that, if they are not decided in four months from the vacancy, the Church must be settled. Lord Advocate replied, That the canon law is not binding here ; that the point of right would have been decided long before the settlement, had it not been Lee's affected delays till the settlement was over. At advising, I gave my opinion, that the Church judicatories *were not obliged to wait years* till a controversy touching the patronage should be decided. That such was my opinion in the case of the parish of Culross, 26th June 1751, *when I was single*, that I thought the two cases quite similar, but my opinion was still the same, as that was but one decision. Kilkerran and Drummore were both of my opinion in *this* case, and said there was

“ an essential difference betwixt it and that of Culross, for that
 “ here there were two presentations, whereas there was but one
 “ in that of Culross, though there the town claimed the right of
 “ settling the second minister, and were so far in possession, that
 “ the second minister first settled there was chosen by them, and
 “ since that time all the settlements were by calls without presen-
 “ tation, and what they insisted for was, the moderation of the call.
 “ The President thought there was a difference betwixt the two
 “ cases ; but if he had been then in Court, that I should not have
 “ been single, for that he would have been of my opinion. Upon
 “ the vote we preferred Mr Dick, the incumbent,—*renit*. Milton,
 “ Minto, Justice-Clerk, and Shewalton ; and for the interlocutor,
 “ were Strichen, Kilkerran, Kames, Drummore, and I ; and the
 “ President quoted a case of Sir Alexander Cumming, determin-
 “ ed by the House of Peers, that he said was quite similar, where
 “ they found that Sir Alexander had the right of patronage ; but
 “ in respect that the Church was settled, while there was one in-
 “ terlocutor of ours unaltered, finding some defect in his right,
 “ therefore they found that the minister settled had right to the be-
 “ nefice, and that, on the motion of the late Duke of Argyle. 24th
 “ November, The Lords altered the last interlocutor, six to five,
 “ and the President and Justice-Clerk not there. 2d March 1753,
 “ Again altered, and adhered to the first interlocutor, six to five,
 “ and Drummore in the chair.”

Your Lordships will observe, that except Elchies and the President (the first President Dundas) none of the Court had any doubt on the point, if it arose when there was a *single* presentation to which the Church illegally denied effect, and settled another. The point of difference in this Lanark case arose from that very fact, which Sir Henry Moncreiff thought was against the minister, viz. that there were *two* presentations, in which case the majority of the Court at last held that the Church was not obliged to wait, but might settle which they chose of the two presentees, as they did not, it was said, in that case deny effect to patronage. In the other class of cases,—that to which the present belongs,—when effect is denied to a presentation, there being only one, on a ground not legal and competent, and which is not on the result of a trial, if in *such* a case, of a *single* presentation, the Church settles another, the Court, with the exception of the two Judges I have mentioned, entertained no doubt. Yet, not aware of the course of the argument and of the views of the Court, Sir Henry Moncreiff thought that the *stronger* case for the Church was that of a single presentation, in regard to which, if the Church refused to settle, and ordained another, he thought it might still be made a point whether the ordination did not exclude all civil jurisdiction. This latter view was admitted to be untenable both by Dr Dick and by the Judges, who, in this Lanark case, on the very opposite

ground, did think,—not that the ordination excluded the jurisdiction of the civil court,—but (a *very different point*) that the Church might, when there were two presentations, *competently* settle one, in order to avoid the evil of a long vacancy in the case. I do not think it can be seriously contended that this was a solid ground for sustaining such a right as within the power of the Church, when it was admitted by them that they had no *general* right or jurisdiction in the abstract. Certainly such a view could not aid the defenders in the present case.

Upon examining the session papers, I see the argument pressed for Dr Dick is exactly that stated in the Faculty Report and Select Decisions which I have quoted. The papers for Dr Dick were written by Craigie, (President,) M'Queen, (Lord Braxfield,) and Brown, (Lord Coalston.) M'Queen admitted in the session papers, which I have in Lord Drummores's Collection: "Supposing that the decret were equal to a declarator in favours of the Crown, and that the Crown were to be considered as patron of this parish, yet it is denied that this would entitle the Officers of State to uplift the rents of the benefice. And here there is no necessity for impugning the general principle, that the patron is entitled to retain the fruits of the benefice where the presbytery refuses to admit the qualified presentee; for that holds only in the case where the presentation is given by a patron, whose right of patronage is not disputed, but will noways apply to the present case, where there was a competition concerning the right of patronage, and where the settlement proceeded upon a presentation given by the reputed patron, before that the point of right was determined."

Again. Craigie says:—"It was observed for the defender, in the first place, in the general, that he is ordained minister of Lanark by the authority of the Supreme Judicatory of this Church, in consequence of judgments given by two successive General Assemblies, and therefore he is and must continue minister of Lanark, in the construction both of the civil and ecclesiastical laws of this nation; whatever judgment be given in the present competition, and consequently it will be hard upon him, if it shall be found, that the Crown has right to the benefice, while he must continue to serve the cure in the town of Lanark, without any fund for his subsistence.

"*Silly*, The defender apprehends it is improper for him to enter into an argument touching the import of the 115th act 1592, that where a patron presents a qualified minister to the presbytery, and the presbytery refuses to admit the presentee, that, in such a case, the patron may retain the benefice during the vacancy; and even though the presbytery should supply the vacancy with another qualified minister. This has been once decided by your Lordships, and but once, in the case of the parish of Culross.—For,

“3dly,” (I entreat your attention to what follows,) “Your Lordships have observed, that, in the present case, the Church hath admitted a minister presented to them by the patron. They have complied with the directions of the act. They have neither kept the Church vacant, contrary to the right of the patron, nor have they presented upon a *jus devolutum* to the presbytery by lapse; the only cases that can be intended by the statute 1592: But they have admitted the minister presented to them by the patron;—there is no vacancy, nor can there be any vacant stipend;—and whatever may be the law in this case, it is not determined by the statute:—For,

“4to, In the present case, there was no less than three competing patrons, and three different presentations, all within the six months;—and therefore, according to the pursuer’s doctrine, the Church could lawfully admit none of the presentees; at least if they did, he was to have no stipend. The other patron might retain the benefice; and the Church hath no power, nor no form known in the law of Scotland, whereby to compel the patrons to bring their competition to a determination in the civil courts. They have no action of multiplepoinding, or any similar process, to bring the competing patrons to a decision of their respective rights; and, therefore, according to the pursuer’s doctrine, the settlement of all vacant Churches in Scotland may be suspended for ever, if two different persons shall think proper, within six months, two present two several ministers, the Church cannot proceed to a settlement till the right of patronage is determined in a civil court, and this depends solely upon the will of the competitors, and may be delayed *in infinitum*:—And, therefore,

“5to, The defender is advised, that the law of Scotland stands upon different principles, and is governed by other and more consistent rules. What the defender intends is, the law of Scotland hath given to the Church the sole power of admitting ministers to vacant churches, and where the patron presents within six months, the Church,” (observe, my Lords, this most vital admission, here made by this great lawyer, as forced upon him by the former decisions and by the terms of the statute,)—“the Church must admit the presentee, unless he is found unqualified upon trials,—a case that can rarely happen,—or there can be no lapse or *jus devolutum* to the Church; the benefice must continue vacant, and the patron must have right to the fruits and rents in the terms of the statute 1592. But if there be two or more competing patrons, who all present within six months, there the law gives the Church a power of judging of the civil right of patronage, and in the competition, to this effect, that they may proceed to the settlement of the Church with all convenient dispatch; and the consequence of such de-

“ cision is, that the patron preferred by the Church must be held
 “ to be patron *in possessorio*, and his presentation the only lawful
 “ presentation, and his presentee falls to be admitted, and hath a
 “ complete right to the benefice ; and as a farther consequence,
 “ he will be held as patron in possession in all other respects, he
 “ will have right to dispose of the vacant stipends, and to present
 “ upon a second vacancy.

“ Neither is there any injustice done to the competing patrons by
 “ the observation of this rule. They may resort to the Civil Court,
 “ and ascertain their right by declarator, and if their right is as-
 “ certained during the vacancy, the ecclesiastical court ought and
 “ will no doubt submit to such decision, which determines the com-
 “ petition. But if the patron neglects to ascertain his right during
 “ the vacancy, the Church is not to blame in giving their judgment
 “ according as the matter appears to them, and in supplying the
 “ vacant church accordingly ; and a declarator thereafter obtained,
 “ though it will ascertain and secure the patron's right in time
 “ coming, yet will not affect the preceding settlement.”

I have read this long passage containing the view of the argument for Dr Dick, as stated by one of the soundest and most cautious lawyers we have ever had. You will see Craigie thinks it to be necessary to admit the jurisdiction of the Civil Court, and the obligation on the Church to receive the patron's presentee if qualified ; and holding that point to be indisputable, he takes the very ground, which Sir Henry Moncreiff supposed to be adverse to Dr Dick, and limits the claim for the right of the Church conclusively to decide the point to the special case of *two* presentations, and the supposed necessity of doing the best for supplying the vacancy. Such a case as the present, he clearly held to be within the undoubted jurisdiction of the Court, and he admitted the obligation imposed by statute on the presbyteries towards patrons and presentee. In another paper for Dr Dick, I see that Mr Brown takes the very same ground.

It thus clearly appears that, in proportion as these cases came to be discussed and understood, the obligation on the Church, under the statutes, to admit presentees if qualified, was seen to be incontestible, and that the same view was taken of the jurisdiction of the Court, with that which I am now pressing. The comparison of this case, and of the *course* of the argument adopted in it on behalf of Dr Dick, and by the majority of the Court, with the ground of decision and the views expressed in the preceding case of Culross, seems to me to prove irresistibly that the point arising in the present cause was held by the Bar and the Bench to be authoritatively and *rightly* settled. It was admitted on the part of Dr Dick, and by all the judges but two, that, if one presentation only comes before the presbytery, from the undisputed patron, the presbytery are bound to proceed to the settlement of that presentee : that

is, *first*, to take him on trials, in order to ascertain if he is qualified,—that they cannot plead the opposition of the parish as a ground for refusing to take him on trials—that such refusal is to deny effect to the right of patronage, and is illegal and incompetent—and then, *secondly*, that if the presentee is found on trial by the presbytery to be qualified, they are bound to receive and admit him. This was fully admitted. Thus the question which occurs in the present case was in truth acknowledged to be settled. The point taken up for the Church as the only tenable ground was, that when *two parties competed for the patronage*, and yet had not settled their dispute until a vacancy occurred, and then each sent a presentation to the presbytery, the latter were entitled to proceed to settle one, in order to avoid delay :—That the patrons were to blame in not preventing this state of things : That in proceeding to settle one of the presentees, the Church in no degree disputed the rights of patrons, or refused to fulfil the obligation incumbent on them to *admit and receive a qualified presentee*—on the contrary, that they then acted in obedience to the presentation, and fulfilled the law. I do think that your Lordships cannot attend to this course of the argument in the case of Dr Dick, and of the views of the Court, without perceiving that the opinion of the ultimate majority in *this* Court proceeded on, 1. the acknowledgment of the jurisdiction I am now contending for ; 2. on the express ground that the presbytery were bound to admit and receive a qualified presentee ; and 3. that if one presentation only was before them, the attempt to settle any other than the presentee, (except *jure devoluto*,) was a civil wrong and illegal.

Sir Henry Moncreiff, in a note, p. 110, gives a sort of anecdotal history of the Reversal of this case in the House of Lords, while Lord Hardwicke presided, which he had heard from Dr Dick during the latter years of that clergyman's life. Sir Henry Moncreiff states, p. 109, that “ Lord Hardwicke, who was then the Lord Chancellor, reversed the judgment of the Court of Session chiefly on “ a ground which none of the parties had anticipated ; and which “ not having at all occurred to the counsel who had pleaded the “ case for the respondent, could not be met by any thing which “ had fallen from the bar. Lord Hardwicke said, that he could “ not conceive how a Scotch bishop could be possessed of power “ or jurisdiction which an English bishop never had. Though “ the answer is very obvious, that they lived under very different “ constitutions, and as bishops had in this point and many others “ a very different jurisdiction, there was no opportunity of making this reply. The decree of reversal was in consequence pronounced, and whether it was well or ill founded, this decision “ has ever since be held as having laid down the law on the subject.”

Sir Henry Moncreiff then goes on to mention, as the sequel of

the anecdote, that in private Dr Dick's counsel sometime afterwards satisfied Lord Hardwicke that he was wrong, and that he, Dr Dick, had a message of acknowledgment in consequence from that great lawyer, that he had done Dr Dick injustice. This is a very odd story. I say nothing as to the probability of the occurrence—*because* there must have been some confusion in Dr Dick's recollection of the facts, or some great conceit on the part of his English counsel, in thinking that he had produced in private the conviction he had failed to do at the bar of the House of Lords. For the truth is, the remark ascribed to Lord Hardwicke was a very important and just one, and, so far from the reply stated by Sir Henry Moncreiff being well founded, it so happens that Sir Henry Moncreiff was in error as to the state of the law respecting the powers of bishops in Scotland. The fact was exactly as it is said to have been stated in the House of Lords, and Lord Hardwicke was right in the observation he is said to have made. Indeed it suggests an additional argument which I have purposely reserved for this place. Lord Hardwicke hearing it contended that the Church had power to affect the right of patronage, to reject a presentee, and that their ordination was to exclude the jurisdiction of the civil court, had, I daresay, naturally asked “what authority had the Scotch bishops “as to these very same rights of patrons? Surely not more than “English bishops had.” *Neither had they*:—For the Scotch bishops *were bound to receive* the presentee if qualified, and could be charged on the decree of the Court to perform that obligation. Nay, Mr Bell founded on that point. Hence the remark of Lord Hardwicke was correct in point of fact, and Sir Henry Moncreiff was under an entire mistake in supposing, that the bishops had in Scotland, the jurisdiction which was claimed for the Presbyterian Church over the right of patronage. And the argument which Lord Hardwicke had apparently founded on the fact, that the *bishops* had not the right of settling any one but the patron's presentee if qualified, is a very legitimate and powerful one. The right of patronage was anterior both to Episcopacy and Presbytery. It was preserved equally, and with the same cautious and scrupulous anxiety by the Legislature, alike in the acts which established Presbytery, and which established Episcopacy. This right remained entire under all changes. The power of collation was given in both cases to each Church, and under the same express duty of receiving the presentee if qualified. Against bishops, it is admitted by Mr Bell, and was settled law, that the duty could be, and was enforced by civil process. And hence, the inference is fair, legitimate, and direct, that, as the same right of nomination was equally preserved under both systems, and the same obligation was expressly imposed in the statutes on each Church—Episcopal and Presbyterian—to admit the presentee if qualified; so if it were held that the civil court had power and jurisdiction to enforce the obligation under the

one form against bishops, in order to secure the free exercise of the right, which the obligation was intended to protect, it must also be held, that the same jurisdiction existed, and could competently be called forth, in order to enforce that same obligation against presbyteries under the *other* system. I own I attach great importance to this argument, and I am not surprised that it was not answered to the satisfaction of the eminent and learned lawyer, to whom it is ascribed.

In the Note of Lord Elchies, which I read, respecting the deliberations on the Bench in this case of Lanark, he states that President Dundas mentioned a case, decided by the House of Lords, against Sir Alexander Cumming, which he said was exactly similar. I was anxious to find out what this case could be. I find in the reclaiming petition, Mr Grant, then Lord Advocate, (who had been, you will remember, counsel for the Church in the Auchtermuchty case,) in restating the case for the Crown, said, that after full inquiry, there must be a mistake and some confusion in this reference—that there never had been any case in the House of Lords arising out of the questions respecting Sir Alexander Cumming's right of patronage, except the one in 1726, which you will remember in a passage I read to you, he, in the Auchtermuchty case, had on the part of the Church then explained and shown not to relate to any thing except the competition for the patronage. The case you will find in Robertson's Appeal Cases. I have looked over the Journals of the House of Lords, and there is no other case whatever except the one in 1726. And, accordingly, I see Dr Dick's counsel attempt no use of this case which the President had mentioned. My Lords, I need not say, for the tradition lies among us all, that an inaccuracy of that sort during the last year of his life, (when, as Elchies' Notes every where show, he was seldom in Court) might have occurred: That great man,—the ablest of all our lawyers—it is well known, failed before he was sixty-five, and outlived his memory and his faculties.

Sir Henry Moncreiff says the cases of Culross and of Lanark were the only two cases of the sort which had ever occurred. As he did not know of the earlier cases, so he was not aware of two more recent cases of equal authority.

5. The next is *Lady Forbes v. M^cWilliam*, February 1762. Fac. Coll. Morison, 9931. The patron in that case was found entitled to the stipend—the Church having settled and ordained the presentee of another who claimed the patronage. The case of Dr Dick was largely commented on, and explained on the part of the ordained minister, by Monboddo, Pitfour, and Lord Hailes, (then Procurator for the Church.) The notion of disputing its authority on such a ground as in the anecdote I have alluded to, did not occur to these learned persons, although they must have been well informed as to the discussion in the appeal: But they

tried to make out a distinction against the Church in Dr Dick's case, viz. that they did not settle the presentee of the patron, who had presented on the immediately preceding vacancy, while in Lady Forbes' case, the Church had :—And therefore they tried to argue (in vain, as might be supposed,) that the Church was entitled to settle, and with conclusive effect, the presentee of the patron who had been the last to present.

6. The case to which I have now to call your attention has not yet been quoted—but it is of the highest importance in the argument. Lord Dundas and Nicolson *v.* Presbytery of Shetland and Gray, May 15, 1795. Fac. Coll.—Bell's Cases, p. 169. Fol. Dict. iv. p. 50. Morison, 9972.

The facts were simply these : A presentation was not *lodged*, or was said not to be lodged, with the moderator of presbytery, by reason of the detention of the vessel by contrary winds, within the six months, although it had arrived in Shetland and at the place of meeting of the Presbytery,—and on *this* ground the presbytery presented another, and settled and ordained that party.

Lord Dundas and his presentee did not appeal to the General Assembly, but instantly raised the Declarator I am now to mention. I mention that fact, for the presbytery afterwards founded an objection to the civil action, upon the ground, taken in the present case, that there ought to have been an appeal to the Supreme Ecclesiastical Courts, in order to give a right to try the point in the Civil Court. That objection was overruled. I take for granted that I need give myself no further trouble with the objection in the present case upon that point.

The action, as originally raised by Lord Dundas and his presentee, contained both *reductive* and *declaratory* conclusions—reductive for setting aside the settlement and ordination of Mr Gray. Then the summons concluded alternatively in the following terms : “ Or at least that it ought and should be found and declared, that “ the pursuer, as undoubted patron of the said Church and parish “ of Unst had, and has the only right and title to present a minister thereto, in the room of the said Mr James Barclay, the “ late incumbent ; that he exercised his right as patron within the “ time required by law ; and that the presentation granted by him “ in favour of the said Mr John Nicolson is valid and effectual ; “ and was with the presentee's license, certificate, and letter of acceptance, offered to the moderator of the presbytery, as is usual “ in such cases, within the time law requires ; and, therefore, that “ the said defenders, the presbytery of Zetland, ought and should “ be *decerned* and *ordained*, by decret *foresaid*, to *give due obedience to the said presentation*, and to *proceed in the settlement* “ of the said Mr John Nicolson, with all convenient speed, according to the rules of the Church : And *until* the final and “ conclusion of the process to follow hereupon, and *that* the “ said Mr John Nicolson *shall be settled in the said Church* and

“ parish of Unst, it ought and should be found and declared, by
 “ decree foresaid, that the pursuer, and the other heritors, life-
 “ renters, and others liable in stipend to the minister serving the
 “ cure of the said parish, are entitled to retain and withhold the
 “ stipend, whether payable in money or in kind, and to prevent
 “ the said Archibald Gray from taking possession of the manse,
 “ glebe, or other rights and privileges belonging to the minister of
 “ the said parish.”

The report in Bell's Cases bears, p. 170, “ This action came
 “ before Lord Eskgrove; and the pursuer, understanding that the
 “ presbytery meant to object to the competency of the conclusions,
 “ in so far as they respected the reducing or setting aside the pro-
 “ ceedings of the presbytery, on the footing that the Court has
 “ no power to review the procedure of Church courts, a minute
 “ was given in agreeing to depart from the rescissory conclusions,
 “ and this being admitted the cause proceeded on the declaratory
 “ parts of the libel.”

The competency of the *declaratory* conclusions was not disput-
 ed by the presbytery, although they most strenuously maintained
 that the right of presentation had devolved upon them. You will
 find the case fully reported in Bell's Cases. The exact terms of
 the interlocutor are given in a Reclaiming Petition: “ The Lords
 “ *repel the defence, and find and declare in terms of the declara-*
 “ *tory conclusions of the libel.*”

Now it will be observed that the foundation of the decree in
 that case as to the stipend and the manse and glebe are the very
 propositions, contained in the present Summons, and which the
 Court in that case affirmed. 1st, That the presentation was valid;
 and 2d, That the presbytery *were bound to give due obedience of*
the same, and to proceed to the settlement; and then, 3d, *until*
 Mr Nicolson shall be settled in the Church and parish, that the
 Court should find and declare that the stipend is not payable to
 Mr Gray, but is to be retained by the patron, and Mr Gray ex-
 cluded from the manse and glebe. It is true that the Summons in
 Lord Dundas' case so far goes beyond the present summons, as to
 conclude that the presbytery should be *decerned and ordained* to
 obey the presentation and to settle:—and it is true enough, that
 practically no effect could be given in terms to that conclusion—if
 it was incompetent to set aside the ordination. But, on the other
 hand, this conclusion was by no means superseded or laid aside
 entirely by departing from the reductive conclusions. On the con-
 trary, it was the *foundation* for the decree as to the stipend and as
 to the manse and glebe;—The refusal to obey, no matter although
 caused by an insurmountable impediment created by the presbytery
 themselves, being the ground of the last part of the declaratory
 decree. The declaratory decree, in terms of the conclusions, runs
 that *until* the presentee was settled in obedience to the presenta-
 tion, the patron should retain the stipend and manse and glebe:
 It might be true that the ordination of another prevented them,

ecclesiastically and insurmountably, from implementing the conclusion, that they must settle the presentee: But then that obligation, which remained in the conclusions of the Summons, and was not departed from, was the ground for the judgment as to the stipend and temporalities; and so it went, that, *until* they settle, the patron should have his rights.

I may here notice, that Lord Dundas had to give in a short Reclaiming Petition, for the Summons had been worded in such a way as apparently to entitle the parties *liable* in stipend to retain the same as *against him*, and he had not qualified the matter in getting the declaratory decree. He therefore presented a *pro forma* petition, praying the Court, “so far to explain and vary your interlocutor, as to find that the petitioner, Lord Dundas, is entitled to intromit with, and dispose of the whole stipend of the parish of Unst, until such time as the charge shall be supplied with a minister in virtue of a presentation granted by him.”

The Court of course complied with this application, which, indeed, was necessary to make the decree conformable to the opinion of the Court.

I see this case was tried on the part of the Church generally, and the papers are given not merely for the presbytery, but on the part of the Procurator for the Church—the late Lord Robertson. I think your Lordships will see at once the great importance of this case in proving the understanding of all parties, as to the competency of the conclusions of the action as ultimately restricted.

The next case to which I have to request the attention of your Lordships, arose out of the disputed settlement of the parish of Kiltarlity. There were two cases, each of them very instructive. The first is that of Baillie and others against J. Morison and the Rev. C. Fraser, February 28, 1822, reported in Shaw and Dunlop, and in the Faculty Collection. This case was a Suspension and Interdict at the instance of certain parishioners, describing themselves to be, elders, heritors, members of the kirk-session, and parishioners. They applied for an Interdict, to prohibit the settlement of the presentee, who had been presented by the commissioner of a Roman Catholic patron; and they contended, that under the 10th of Queen Anne, Chap. 13, the presentation was void and null. To this Suspension and Interdict the *presbytery were made parties*. In truth, the prayer for the interdict was to prohibit the presbytery from going on with the settlement. The presbytery had sustained the presentation before the interdict was applied for, and then these parties interfered to stop the other proceedings. The following is the summary of the pleas maintained by the parties, as appearing in Shaw and Dunlop's Report, and of the result.

“1. That it was incompetent, by *suspension* and *interdict*, to interfere with the proceedings of the presbytery in the settlement of a minister. 2. That Baillie and others had no title to

“pursue. And 3. That a presentation by the qualified commissioner of a Catholic patron was valid under the statute. The Court ordered intimation to be made to the Officers of State, who, however, did not appear, and their Lordships afterwards, on advising memorials and a hearing in presence, and on the report of Lord Kinnedder, as probationer, *repelled the objection to the competency as the question regarded the civil right of patronage*, but ‘in respect that the suspenders have no title to object, alter the interlocutor reclaimed against, and remit to the Lord Ordinary to refuse the bill of suspension, and recal the interdict.’”

The case was very fully discussed. The first paper for the patron and presentee was written by Lord Mackenzie, then at the Bar, in which the incompetency of the suspension and interdict was very fully argued; and, in particular, the cases were quoted, in which advocacy, as already mentioned, had been found to be incompetent. On the other hand, the parties contended for the competency of an interdict to stop any proceedings in themselves illegal, whether carried on by an ecclesiastical body or not; and this was rested on the broad ground, of the necessity of such jurisdiction, in order to prevent wrong. I would request you also to observe the report of the case in the Faculty Collection, and I may quote the opinion of the Court upon the pleas as maintained.

“There existed no doubt on the Bench that the case was competent. But Lord Succoth considered the question of title as one of great difficulty. Have the suspenders not an interest to object to a pastor nominated by a person totally disqualified? for in arguing the question of title, we must assume the disqualification. See case of Presbytery of Paisley against Erskine, 10th August 1770.

“The majority, however, of the Court thought that the suspenders had no title. If the pastor have no right, then the Crown has the right. If the Crown do not exercise it, it falls *jure devoluto* to the presbytery. Now here the Crown is silent, and the presbytery have approved of the presentation. Where then have the suspenders a title? They have no patrimonial interest. The right of patronage can never devolve to them. No doubt they have a spiritual interest, but that cannot give them any title to object to the power of the patron, although it may to move before the presbytery, if they conceive that any moral disqualification attaches to the presentee.”

“The Court thought the *bill of suspension was competent*, as there was a patrimonial interest,—the right of patronage,—involved in it; but ‘in respect that the suspenders have no title to object, alter the interlocutor reclaimed against, and remit to the Lord Ordinary to refuse the bill of suspension, and recal the interdict.’”

It seemed to be thought by Mr Bell, that it was doubtful whe-

ther the presbytery were a party to those proceedings ; but there is no doubt upon the point. The pleadings in the case are now lying before me,—the presbytery are called as parties in the suspension and interdict. The application for the interdict is, in truth, for an injunction upon them to stay their proceedings. It is very true that the patron and presentee resisted this application, and they had a clear title to do so. But the parties who were to be interdicted were in truth the presbytery.

Now your Lordships will particularly remark, that, according to both reports, none of your Lordships entertained any doubt whatever of the jurisdiction of this Court, and of the competency of interdicting and arresting the proceedings of the Ecclesiastical Court, if a sufficient ground in law was alleged, such, for instance, as the necessity of preventing illegal wrong.

The second case, which arose out of this vacancy in the parish of Kiltarlity, was decided on the 10th June 1823. It is reported under that date in Shaw and Dunlop. It is of importance, with reference to another point, viz. the legal effect of a deliverance by the presbytery receiving or *sustaining* a presentation. The rubric of the decision is thus given :—“ Personal exception,” —“ A Presbytery, who had agreed to receive a presentation by a patron who was a Papist, held barred from afterwards objecting to it on that ground.” When the presentation was first laid before them, it appears that the presbytery, in the full knowledge of the fact, that Lovat, a Papist, was the patron, *sustained* the presentation ; but the parishioners having taken up the point as to the legality of the presentation by a Papist, and considerable delay having occurred, the presbytery refused to proceed farther, took up the same ground with the parishioners, and contended, that, in respect of the invalidity of the presentation, the right had fallen to them, as the Crown had not presented within the six months. The report bears, that “ Lovat and the presentee pleaded, that the presbytery *having received the presentation* were now barred from objecting to it, and refusing to settle the presentee.”

Your Lordships will now see the great importance of the change made by this *Veto* act, on the established style and form, which had been always observed in the first deliverance by a presbytery, when a presentation was presented to them, viz. to *sustain* it. The Court here distinctly held, that as the presbytery had in the first instance *sustained* the presentation, they were barred from refusing to proceed, on any ground which did not involve, or arise out of, a trial of the qualifications of the presentee ; and hence it is clear, that, if the presbytery in this case had pronounced such a deliverance in the established style, they would not have been entitled to refuse to take the presentee on trials. The *form* and *style* was changed by the Veto Act, in order to evade the dilemma in which that form and style in the immemorial course of procedure placed them. If they were to

continue, as heretofore, the uniform practice of *sustaining* the presentation, then the framers of this veto act knew that they could not refuse to take the presentee on trials. If they did *not* sustain the presentation, then they would at once (as Mr Bell admitted) deny effect and authority to the patron's right of nomination. And so they devised this sort of intermediate course (clumsy enough), *in so far to sustain* the presentation as to appoint a day for moderating a call.

This case of Kiltarlity, then, in both of its branches, distinctly raised two of the important points which occur in the present cause. The first case raised the question of the competency of interdicting the proceedings of the presbytery, even when they were going on (in the discharge of their duty under the statutes,) to proceed with the settlement, and to receive and admit the presentee, if qualified. Surely, then, the case for the interposition of the authority of this Court is much stronger if they *refuse* to act at all ; or attempt to *settle another party*.

In conclusion, as to the authorities upon the subject, I must notice in passing a case which has occurred since the present action was raised, arising out of a vacancy in the parish of Lethendy, in the presbytery of Dunkeld. The Crown presented,—the presentee was *vetoed*. Declining to try the question, the Crown was advised to grant a second presentation to another party. The first presentee, however, did not withdraw, but maintained that he was validly presented, and that the rejection was illegal. He then raised a declarator, I understand, but, at all events, applied for an interdict to prohibit the presbytery going on to settle the second presentee. The presbytery declined the jurisdiction :—Lord Jeffrey repelled that plea, and interdicted them from proceeding with the settlement. And what has been the result ? They did not reclaim to the Court ; they acquiesced for the present in the interdict, though I understand that they have appeared in the case now regularly in preparation. Here, then, is an instance of this very collision having occurred, from which my friend Mr Bell anticipated such fearful consequences ; and the result has been,—as might be anticipated,—that the presbytery felt constrained to obey the injunction of the civil court, and that we have no attempt made to acquire any sort of martyrdom, by running their alleged ecclesiastical duty against the authority of the law.

In those cases which I have now noticed, no doubt the application to the Court, with the exception of the case of Kiltarlity, was made in circumstances when it was no longer possible *wholly* to *prevent* wrong. The patrons had taken their chance of an appeal to the superior ecclesiastical courts, or, from one cause or other, another than their presentee had been ordained. Now, the ordination is certainly irrevocable, and the only redress that could be given, was by finding that the patron was entitled to retain the stipend. But in order to arrive at that result, the Court

held themselves entitled to consider, and decide upon the legality of the procedure of the presbytery in every point,—and, wherever the rejection of the presentee was not well founded in point of law,—that is to say, where they did not proceed upon a ground *competent* to the presbytery under the act,—effect was denied to the ordination, and the right to the stipend withheld from the person ordained. Now, it appears to me, that all of these cases apply *a fortiori* to the present; and that, as the Court have interfered—even after the patron has allowed the settlement to be carried through by the presbytery, and their man to be ordained,—to the effect of holding such ordination not to be conclusive, it must be still more competent for the Court to interfere in order to prevent the wrong being done.

I have, however, introduced so many remarks upon the nature and extent of the jurisdiction of the Court, when commenting upon the cases, that I shall not now consume time by any recapitulation.

III.—I am now brought to consider the third important point in the case,—whether the Summons asks for such a decree as this Court can pronounce, and against the proper parties to be called as defenders in such an action.

Obviously in discussing this point, the *general jurisdiction* of the Court is to be *assumed*. I am entitled, as the condition of this part of the argument, to hold, that the Court has the jurisdiction for which I contend, and that the ground of rejection of the presentee is illegal and incompetent. And the point is—granting such jurisdiction and such wrong—do I come to the Court in the way that is technically and formally correct and sufficient to give an opening for the interposition of the Court?

Now, then, observe the exact state of things, on which the appeal is made to the jurisdiction of this Court. You have jurisdiction,—we are to assume:—you have jurisdiction to try the point that I raise; you have jurisdiction to decide on the legality and competency of the ground, on which the presentee has been rejected. Now the presentee of the patron is rejected, in respect of the *veto*:—Then the legality of that rejection, *ex concessis*, the Court can determine. Again, the act of Assembly, on which he has been rejected, declares, that such rejection is to forfeit the patron's right, on the lapse of the six months; and that the presbytery are thereby to acquire the right, *tanquam jure devoluto*. Now surely as the Court are entitled to try this point, the question as to the extent of their jurisdiction is the same which occurs in all other instances. If they can decide the rejection to be illegal, is it not inherent in their jurisdiction to *prevent* the wrong which such rejection is to lead to, and is intended to introduce? The declared effect of rejection, in respect of the Veto, under the act of Assembly, is to transfer the right of

patronage to the presbytery. Then the presentee is *vetoed*, and the presbytery, on that account, without trial, reject him ; and they reject him, expressly under the act of Assembly, which is to give them the right of presentation for that turn.

Here, then, everything is open,—the presbytery have, as yet, done nothing whatever to exclude the interference of the Civil Courts, as to the settlement. They have not ordained any one.

What ground of objection, then, is there to the competency of an interdict, which is to prevent the *usurpation* of the civil right by the presbytery, and which is to render the decree of this Court effectual ? It seems to me to be quite clear, that the competency of the present application necessarily follows from the jurisdiction being admitted ; and I do not see how, if the first proposition can be made out, the second can be disputed.

Let me call your attention to what the conclusions of this Summons are. I shall read them.

“ Therefore, it ought and should be found and declared, by
 “ decree of the Lords of our Council and Session, that the pursuer,
 “ the said Robert Young, has been *legally*, validly, and effectual-
 “ ly *presented to the church and parish* of Auchterarder : That
 “ the Presbytery of Auchterarder, and the individual members
 “ thereof, as the only legal and competent court to that effect
 “ by law constituted, were *bound and astricted to make trial of*
 “ *the qualifications of the pursuer*, and are still bound to do so,
 “ and, *if in their judgment*, after due trial and examination, the
 “ pursuer is *found qualified*, the said Presbytery are *bound and*
 “ *astricted to receive and admit the pursuer* as minister of the
 “ church and parish of Auchterarder, according to law : That
 “ the *rejection* of the pursuer by the said Presbytery, as presen-
 “ tee foresaid, *without making trial of his qualifications*, in com-
 “ petent and legal form, and *without any objections* having been
 “ *stated* to his qualifications, or against his admission as minister
 “ of the church and parish of Auchterarder, and *expressly on*
 “ *the ground* that the said presbytery *cannot* and ought not
 “ *to do so in respect of a veto* of the parishioners, *was illegal and*
 “ *injurious* to the patrimonial rights of the pursuer, and *contra-*
 “ *ry to the provisions of the statutes and laws libelled* : And it
 “ being so found, or, in the event of the said presbytery still con-
 “ tinuing to refuse to discharge their duty by proceeding in the
 “ trials of the pursuer as presentee, and in his induction as mi-
 “ nister of the church and parish of Auchterarder,” &c.,—The Summons then concludes, *first*, that the presentee is entitled to the stipend ; or *secondly*, and alternatively, that the patron is.

Now these conclusions are said to be wholly abstract, such, for instance, as occurred in the case between the commissioners of supply and heritors of Zetland, and the county of Orkney, in which, after the First Division of the Court had held all the other conclusions of the summons to be incompetent, there remained

only what was an abstract proposition,—a conclusion, that it should be found that Orkney and Zetland were one county ; but without any legal result or individual right whatever being connected with that conclusion.

But the conclusions in the present Summons are directly applicable to a most important civil right. Again, the conclusions directly involve the question, whether the presbytery can claim the right of presentation *jure devoluto*. If I get my right declared in terms of the Summons, such decree excludes the *jus devolutum*.

It was said that I do not ask for a *negative* decree,—that is, to have it found that the presbytery have *not* the devolution of the right. Why, even in order to obtain that, I must have first subsumed in the Summons, and concluded that the *patron's right* had *not* been *forfeited* ; and asked for the very decree in this Summons, else I should have had no ground for the conclusion that the presbytery had *not acquired* the right. The only foundation in which such a negative decree could have been rested would have been, that the present presentation was effectual, and that the rejection was illegal.

Hence, then, it was perfectly unnecessary, for the *purposes of the pursuers*, to do more than establish this point. If they get an affirmative decree in terms of their Summons, anything else is wholly unnecessary.

If the question is one for the civil Court,—if the forfeiture of the patron's right, to the effect of transferring the patronage *pro hac vice* to the Church, is a question for this Court to decide—it necessarily follows that you must have authority to render your own decree effectual ; effectual first in my favour ; secondly, against the presbytery. I ask for decree, to find that the presbytery are bound to receive and admit my presentee, if qualified. Is that an abstract conclusion ? It seems to me to be the most practical point in the whole case. And it will necessarily produce the most important practical results.

But then the defenders contend, that I do *not follow up* this declaratory decree, by a conclusion, that they should be *decerned and ordained to do this*. But how can that consideration affect the competency of a direct *declaratory* decree as to the *right* of the *pursuers*, and the *duty* of the *defenders* to give effect to the civil right ? In truth, a decree decerning and ordaining the party to do what is required, is a *remedy*, if our right, when first declared, shall be disregarded, and the obligation contemned. It seems to be very singular to state, that a party may not have his right declared, and the obligation on another party to do another thing in his favour found, because the party does not ask for the *means* immediately of enforcing such decree :—when such declaratory decree is the only foundation for obtaining that remedy, and when it would have been necessary, if I

had now asked for the power of enforcing my right immediately, to have at the same time inserted the very declaratory conclusions now before the Court, in order to get that right first declared which I proposed to enforce, and that duty established the performance of which I desired to have the means of compelling.

We presume, and are entitled to presume, that if the Court declare that they have jurisdiction to enforce the obligation on the Presbyteries, and that wrong has been done, the Church will obey the judgment. It was fitting and right to give the presbytery time, and also to give the Church time, to reflect upon the consequences of the act which they had authorized, after it shall be found to be illegal, and to withdraw it. Even if we had inserted in the Summons such a conclusion,—following up the declaratory decree by a conclusion to have them ordained instantly to go on to take the presentee on trials,—I have no doubt that the Court would, after pronouncing the declaratory decree, have sisted process, for the very purpose of giving the Church time to retrace its steps. Though you have jurisdiction to decide the illegality of any Acts of Assembly that are incompetent, still respect is due to the proceedings of the Church of Scotland, as far as to give them time to recal enactments, thus found to be incompetent; and to leave the inferior Church courts ecclesiastically at liberty, and indeed authorized by the Assembly, to do that, which the Act of the Assembly (so found to be illegal) had prohibited. Hence, therefore, there was a manifest propriety in the course which we have adopted, of confining, in the trial of the illegality of the Act of Assembly, the Summons to the conclusions which I have mentioned,—certainly not abstract in any sense of the term, but intended to set up against the Act of Assembly, the right of the patron, and the effect of the presentation in favour of the presentee. Having done that, it was fitting to wait until we see the effect of the judgment of the Court with the Church.

But surely it does not render a good declaratory conclusion incompetent, that we do not insert, in the present Summons, a remedy intended only for the case of the decree, in terms of the declaratory conclusions, being contemned and set at nought. A judgment, *ordering* them to do the duty, which this declaratory conclusion will establish as *obligatory* upon them, and which must be performed, is a remedy, in truth, for the *non-performance* of the duty *after* the declaratory decree. That the declaratory decree is not abstract, is plain from this, that it is the foundation necessary for the subsequent decree *ad factum prestandum*. But the latter may be afterwards resorted to, or not, according as the party believes or finds that the declaratory decree will, or will not, be obeyed in the subsequent proceedings, and is in truth the remedy for enforcing the declaratory decree.

It will be time for us to do more, when we find that the de-

claratory decree is contemned :—Then we will apply, by an action *ad factum prestandum*, to have the presbytery ordained to do that, which the present decree will tell them they are bound to do. Again, it is time enough to call for an interdict, to prohibit them settling another party, when setting at nought the present declaratory decree (if we obtain it,) they shall attempt to proceed to induct another. Again, we have the specific conclusion, that if they do not proceed to receive and admit the presentee, the stipend is to belong to the patron. This will probably act as an effectual and satisfactory compulsitor. But, at all events, it is one of the legal consequences of the right which we wish to declare. Now this, certainly, is not an abstract conclusion, for, on the contrary, it is a direct patrimonial right, and practically affects the interests of the parties concerned in the discussion.

To be sure the argument of the defenders is very whimsical. They object to the jurisdiction generally, upon the assumption, that a decree could not possibly be enforced; and hence they argue back, that if it cannot be enforced, it is not likely that you have the power to declare it. But assuming, which we are to do at present, that you have the jurisdiction to declare the right, it is rather singular, at the same time, to turn round and tell us, that this application to the jurisdiction of the Court *becomes* incompetent, because we do not go on to ask the Court to ordain the presbytery to act,—that is to say, to object to us, that our case is inconsistent, because we do not do that, which they begin by announcing, they hold to be utterly incompetent.

But further I apprehend it to be quite clear, that even *if the Court could not enforce* the decree, by *compelling* the presbytery to act, the *declaratory* decree as to the right of the presentee, and the obligation on the presbytery is *not the less necessary* or the *less competent*. It is competent, as the declaration of the relative rights of the parties ;—it is necessary, as the foundation for the judgment as to the right of the stipend ;—it is fitting, because such a result as the refusal of the Church to do that which is solemnly found to be their duty, is not presumable in law, and not likely in point of fact.

But it would indeed be a singular result, if it were found, that after this Court had declared that the right of the patron had not been forfeited, the presbytery (without redress or remedy to the patron being competent or possible) could still go on to *usurp* that right. That would be an usurpation of a *civil* right; and hence, if it is competent to declare the right, it must plainly be necessary to prevent such wrong.

The declaratory conclusion is, that the presbytery are bound to receive and admit the qualified presentee,—that is, to take him on trials. Now, if I have satisfied your Lordships that that obligation is imposed by statute, I apprehend it to be quite clear that the civil court may, by decree, both declare and enforce it.

Here, my Lords, you will observe the importance of attend-

ing to the distinction between the Points in the argument, and to the *condition* upon which plainly this part of the argument is to proceed. On looking to the question, whether the conclusions of this Summons are competent, you are to assume the separate point as to the general jurisdiction of the Court, and you must assume the other point, viz. that the obligation on presbyteries is imperative by statute:—And if the obligation is imperative by statute, and if you have jurisdiction to take cognizance of incompetent acts in violation of the statute,—then, is it not plain, that the remedies for explicating your jurisdiction must be *commensurate* with the *nature of the obligation* on which it is competent for you to decide, and the *nature of the wrong*, which you are entitled to declare?

Now then, *if* this is a statutory obligation, what is the Church to plead against such a Summons as the present? Are they entitled, *then*, on this supposition to rear up the defence of scruples of conscience, on which we have heard so much,—to say that this *Veto* Act is a regulation of the General Assembly,—that a judgment as to its illegality puts them in an awkward position between the civil court and their ecclesiastical superiors; and are they to be sent to prison, it was said, if they refuse to obey the decree ordaining them to do their duty, but prefer to act in obedience to the regulations of the Church?

Why, in the *first* place, we don't propose at once to bring it to this issue, till we give the Church time to retrace its steps.

But in the *second* place, how can scruples of conscience ever be pleaded by the clergy of an *Established* Church, as a reason for not *enforcing* against *them* an obligation, which is imposed as the condition of its establishment? No Body, or individuals, taking the benefit of such a statute, retaining the status and the endowments flowing from statute, can plead scruples of conscience as a reason, why courts of law are not to enforce upon them the obligations, which the statute declares were the conditions, on which these benefits were given. I hold such a plea to be perfectly absurd on the part of the clergy of an Establishment. Their status, and rights, and endowments, flow from statute. If the statute says they shall have the latter only under the condition of performing certain duties, and if, forsooth, they have scruples of conscience, as to the performance of those duties being consistent with their ministerial character, or as to the propriety of obedience to the statute,—what is to be the result? That the statute is to yield to them?—that the civil court, whose general province it is to enforce statutes, is to take their scruples of conscience against the statute? Why, the answer is plain,—let such parties *withdraw* from the Church, with the statutory foundation of which they are dissatisfied:—If they will not perform the obligations which the statute imposes, let them not remain in that establishment, with the conditions of which they are dissatisfied. Let them withdraw and secede. This is the true result of

scruples of conscience in such a case. But it is really ludicrous to hear the clergy of an Establishment created and endowed by a statute, which imposes a certain duty as one condition of their being endowed, while they retain their status, privileges, and endowments, yet pleading scruples of conscience, forsooth, as a reason for absolving them from the discharge of the duty, without which they never would have received their endowments.

Again, the Church continues to insist, and most justly, for its right to take a presentee on trials, and to give collation on the presentation,—in short, to receive and admit ministers. But then their right to take on trials and to admit is *limited* and *astricted* to the presentee duly presented; and the presentation is both a warrant and an order upon them to take such presentee on trials. Now, it is clear, if I have satisfied you on the previous part of my argument, that, but for the special authority given to examine presentees, the presentation would have filled the parish. But then that power to examine is given under the *obligation* to *admit* the party *if found* to be *qualified*. Then is the Church to tell us, that although the obligation is imposed by statute,—although the Court has power to enforce the obligation,—I say are they to tell us, that it is incompetent to take a judgment in a declarator as to the right? Are they to tell us that they will keep the power of collation—but that it is against their conscience to exercise it under the conditions and duties prescribed by the statute, which gave them that power—and yet to remain in the establishment which was founded only under such conditions and limitations?

I wish to know how the conclusions of this Summons can be incompetent if you have the general jurisdiction I have contended for? True, I don't seek, in the first instance, for a direct order upon the presbytery to perform their duty: But though that is postponed, I am entitled to declaratory decree for the very purpose of ultimately obtaining that remedy.

But whether I should be entitled, ultimately, to that remedy or not, these declaratory conclusions are necessary for having the right to the stipend declared; and certainly it cannot be proved that it is incompetent now to try that point *before* the Church has ordained another into the office. On the contrary, the only doubt would have been, whether it was not too late to try the point if the Church had been allowed to induct another before litigiousness was created.

But let me call the attention of your Lordships particularly to the conclusion as to the stipend. You will remember that the terms of the deed of presentation dispoise the stipend to the presentee. By that deed the right is vested in Mr Young.

In the cases I have quoted, the patron was found entitled, when the presentee was illegally rejected, to retain the stipend, *as in a vacancy*:—Observe, not *because of* a vacancy:—It never was held or found that the patron's right under the statute, when the presentee was illegally rejected, was to retain *only for*

pious uses. That is not the object of the provision. It was not found that there was a vacancy. On the contrary, it was held that there was no vacancy so far as the patron was concerned : That he had nominated and presented to the parish, and that *he* had supplied *the vacancy*. Any other limitation would, comparatively speaking, have rendered the patron useless. The Court sustained the claim to retain, for the purpose of giving effect to the right of the patron and the presentee ; and hence, as the patron is entitled to retain,—why, in a question between him and the presentee, the right is vested in the latter by the gift in the presentation. And as the patron can withhold the stipend from any other party, because his presentee was illegally rejected,—So on that very ground the presentee will be entitled to the stipend from *him* under his own deed of gift.

In the same manner it is quite plain that when we come to the question with the collector of the Widows' Fund, They could not claim:—For they only obtained, (by the consent of the patrons,) a right to the stipend in the *ordinary* case of *vacancies* for the half-year, during which the patron might apply it to pious uses in the parish. But the very ground of the decisions, finding, when the presentee has been illegally rejected, that the patron might withhold that stipend from any other person inducted, was truly, that, in a question with the patron, there was *no* vacancy, because he had duly presented. And so it is plain, that if the claim on the part of the widows' fund in this case should be brought against the patron, it must fail.

But how can my learned friend exclude my trial of the question with the presbytery, by saying that I *may* fail with the Widows' Fund ? Why, I am entitled to have every thing found against the presbytery,—(if I am otherwise right in my conclusions)—which will be necessary to enable me to try that question, fairly and fully, with the Widows' Fund. Indeed, the claim of the Widows' Fund can only be raised up in the event of the patron's success in the present action, for the only right that they could state would be as in right of the patron. And hence it is necessary to make out the patrons' right to retain, in order to make room for their claim. As in the case of Lord Dundas, the stipend, manse, and glebe must be withheld from the person, who may under this act be inducted by the presbytery, if I prove that the presentee was illegally rejected. Now, then, to secure that result, the declaratory conclusions in this Summons are necessary.

But further, whether the obligation imposed on the presbyteries can be directly enforced or not, as it is settled that the stipend may be withheld from any other whom they illegally induct,—so the *previous* determination of that point becomes a practical remedy, extremely beneficial for securing the performance of the duty which (say) you cannot directly enforce, and which remedy, therefore, it is only the more necessary to give.

Here let me observe the manifest perversion made by the de-

fenders of the well known rule, that the *title* of a party to the stipend, and to the manse and glebe, is *not completed* until induction. That was in truth a rule for the protection of the patron, for, until induction, he was entitled to retain the stipend. The Church had no means of itself, of giving any party a title to claim the stipend and the other temporalities. So that if the patron should say, these were to be withheld till his presentee was inducted, he also might withhold them from any other person inducted. The object of this rule was in truth to force the Church to receive and admit his presentee, unless he was found not to be qualified. But in the question between the patron and the presentee,—if the latter is illegally rejected—the rule cannot possibly hold; for, against the patron, the presentee has an unqualified grant from him of the stipend and temporalities. It is not the fault of the presentee that he has been illegally rejected,—it is a wrong of which he complains as much as the patron,—and hence he comes forward, and may irresistibly plead as against the patron, that when the latter has been found entitled to withhold the stipend and temporalities from the person inducted by the Church, because the presentee was duly presented and illegally rejected, such a decision only the more obliges the patron to give effect to his own grant in favour of the presentee, and the more entitles the latter to demand from *him* the benefit of that grant.

It is in truth *jus tertii* to the presbytery, what the patron does with the stipend, as he is not bound to apply it to the pious uses of the parish in such a case as the present. The presentee is in truth the assignee of the patron. I apprehend the patron could not withhold from the presentee; at all events, in the present case the presentee appears with his concurrence and in his right.

But, while I have thought it thus necessary to explain the object of the *first* conclusion as to the stipend, you will observe, that the Summons concludes *alternatively* that the *patron* is entitled to retain the stipend. Now to the competency of that conclusion I heard no objection at all. It surely cannot be said that—when it is competent to have such right found *after* the induction of another man, and when the wrong done by that ordination is irremediable,—it is incompetent to try it before the ordination, when the presentee may still be taken upon his trials,—when such a decision is one of the remedies most likely to secure his being taken on trials, and practically to prevent before hand the ordination of another.

But, at all events, being the established right of the patron, in the event of the wrong being completed, why—upon the ordinary principles in the law of Scotland as to the objects of an Action of Declarator,—as soon as the question is raised by the effect of his presentation being disputed, and by the illegal rejection of his presentee, the patron has an unquestionable right to have the full extent of his rights declared, and to have it found that, if that rejection is persisted in, and until the presentee is inducted, (if

qualified) the occasion has arisen for that established right of retaining the stipend.

These are all trite points in regard to an action of declarator, as to which, when the questions are separately considered, I am persuaded that your Lordships will entertain no doubt. But there has been great confusion throughout the argument of my learned friend. The questions as to the legality of the *Veto*, and the powers of the Assembly, were mixed up in every part of his speech with the separate question as to the jurisdiction of this Court, and the extent to which it would interfere: And again the objection as to the competency of the present conclusions of this Summons, which was *stated* to be a separate question, was equally mixed up with the general question, as to the jurisdiction of this Court, and the purposes for which that jurisdiction should be exercised. Those three questions are perfectly distinct and separate. I may have been right in the two first branches, and yet I may not have raised a competent action. But, then, in considering this latter point, as to the competency of the conclusions of the present summons, you must give me the full aid and benefit of all the points, which I assume that I have established in discussing the previous questions: And the only objections, strictly relevant and competent in this view, to this present Summons, must then be objections to the action, as not consistent with the points previously made out to the satisfaction of the Court. Now, after full consideration of the subject, it humbly appears to me that the objections taken to this present Summons are in truth just a repetition, in another form, of the objections to the jurisdiction of the Court, and would necessarily exclude any summons with any conclusions, because they would exclude any interference or exercise of jurisdiction by the Court with the Church, in the matter in question, to any extent whatever.

IV. The last point I do not mean to resume or discuss separately. I have already shown you, *first*, that there was no *acquiescence* in the proceedings of the Assembly,—I have already shown you, *secondly*, that in order to make the *civil action* competent, it was not necessary to carry the rejection, in respect of the veto, by appeal to the General Assembly,—indeed one of my fundamental objections to the *Veto* is, that I could have obtained no redress by appeal, since no appeal is permitted, because there is no deliberative or judicial judgment of the presbytery at all.

My Lords, after the length of this argument, it would be unpardonable to recapitulate,—it would be even unpardonable, in expressing my gratitude for the attention I have received, to do it at greater length than simply by thanking your Lordships.

My Lords, I trust I have shown good grounds in law for decree in terms of the conclusions of this Summons.

Tuesday, December 12, 1837.

THE LORD PRESIDENT.—“MR SOLICITOR-GENERAL.”

THE SOLICITOR-GENERAL.—In rising to reply on the part of the defenders, however reluctant to waste a moment in prefatory remark, I must be permitted to say, that I approach the present case with the greatest anxiety, whether I consider its importance to the country at large, or the magnitude and variety of the topics which have been drawn into argument. One might naturally expect, that, in a discussion of this kind, the ground should be narrowed as the debate advanced,—that the lists should be contracted in the hour, as it were, of mortal strife. But it often happened otherwise, and in this case remarkably so; for the field grew wider, and more wide, as the conflict was prolonged; position after position was taken up by both parties; till at last they were in danger of abandoning altogether the points on which alone the contest turned.

It shall be my endeavour in these observations to throw out of view a great deal of matter, superfluous and irrelevant, as I conceive, that has been introduced into the discussion; and to recall your Lordships' attention, directly and immediately, to the questions upon which the case really hinges, and to the considerations necessary for its decision. Nor shall I resume the argument which the Procurator submitted on the plea of personal exception—my object being rather to make an addition to some part of his reasoning, than to go over a second time what he has so ably stated.

In proceeding with the settlement of a presentee to a parish, according to the existing law of the Church of Scotland, the course, as prescribed in all the institutional books, is to lay upon the table of the Presbytery the patron's presentation with the presentee's letter of acceptance, certificates of both parties having qualified to government, and an extract of the presentee's license, if he is not already an ordained minister, and in possession of another cure. The presentee is then appointed to preach on one or two Sundays in the church of the vacant parish; and a day is

also fixed for the purpose of moderating, or presiding, in what is termed the Call. This is intimated to the congregation, who are informed that a presentation has been lodged in favour of the presentee. At the meeting on which the Call takes place, a sermon is preached by a member of presbytery, who is appointed to moderate or preside; and the people, at the conclusion of public worship, are invited to subscribe a Call to the presentee, the nature of which shall be afterwards considered. If the Call is properly subscribed, it is laid before the presbytery, who, in the ordinary course, then pass a resolution concurring with or sustaining the Call, which is put into the presentee's hand; if he accept of it, the presbytery devolve on him the care of supplying the vacant parish with public worship, and appoint trial to be taken of his qualifications. This trial proving satisfactory to the presbytery, he is required to subscribe the formula; and a day is then fixed for *serving the edict*, as it is termed, or publicly proclaiming to the congregation, after sermon, that the presentee is to be ordained, and requiring any one who knows cause against his admission, to notify the same. A day is appointed for the ordination, on which occasion the presbytery must, before celebration of public worship, receive the report of the minister by whom the edict was served. The officer is then directed to proclaim, that, if any one has objections to the life or doctrine of the presentee, the presbytery are ready to hear them. Any objections which may be then stated must be immediately proved, or are disregarded; if no objections are stated the presbytery proceed to ordination, and induct the presentee.

Such generally are the steps required by the law and practice of the Church, for the induction of a clergyman of the Establishment to spiritual connection with the cure.

In 1834, the General Assembly thought fit to pass an interim Act, which they at the same time directed to be transmitted to presbyteries in terms of the Barrier Act of the Church, in order to its being enacted in due form as law. By that interim Act the General Assembly declared, "that it is a fundamental law of this Church, that no pastor shall be intruded on any congregation contrary to the will of the people; and in order that this principle may be carried into full effect, the General Assembly, with the consent of the majority of presbyteries of this Church do declare, enact, and ordain, that it shall be an instruction to presbyteries, that if, at the moderating in a Call to a vacant pastoral charge, the major part of the male heads of families, members of the vacant congregation, and in full communion with the Church, shall disapprove of the person in whose favour the Call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the presbytery rejecting

“such person, and that he shall be rejected accordingly, and due notice thereof forthwith given to all concerned; but that, if the major part of the said heads of families shall not disapprove of such person to be their pastor, the presbytery shall proceed with the settlement according to the rules of the Church: And further declare, that no person shall be held to be entitled to disapprove as aforesaid, who shall refuse, if required, solemnly to declare in presence of the presbytery, that he is actuated by no factious or malicious motive, but solely by a conscientious regard to the spiritual interests of himself or the congregation.”

Your Lordships will observe, that, although this act has been termed in the argument a declaratory law, it is properly declaratory in so far only as it asserts, that it is a part of the fundamental law of the Church, “that no pastor shall be intruded on any congregation contrary to the will of the people.” In other respects, and particularly in the regulations which it proposes for the purpose of carrying that principle into effect, it is plainly enactive; inasmuch as it contains instructions or directions to presbyteries, with respect to what shall be considered a sufficient and adequate Call; ordaining them to reject the party, as not having a sufficient Call, where the major part of the male heads of families, members of the vacant congregation, and in full communion with the Church, have disapproved of the presentee, but to sustain the call as adequate and sufficient where such majority shall not have disapproved of the presentee, and to proceed with the settlement, as in the case of a sufficient Call, agreeably to the rules of the Church; and farther providing, that any party appearing to disapprove may be required to declare solemnly in presence of the presbytery, that he is not actuated by factious or malicious motives, but solely by a conscientious regard to the spiritual interests of himself or the congregation. The Assembly, in short, lay down in declaratory words the fundamental principle of the law, and introduce by enactment a regulation in itself new, for the purpose of guiding presbyteries in determining what shall be deemed a sufficient or adequate Call.

The Call, as will be immediately shown, was known in the earliest period of the Church, and has all along been, as it still is, *essential* to the admission of an incumbent; the fundamental principle, which the Assembly *declared*, was beyond all doubt the law of the Church, whatever question might be raised, as to the regulation proposed for the purpose of rendering that principle more effectual and more authoritative.

Connected with this interim act, referring to it, and upon the narrative that it was proper to lay down some precise and definite rule for the course of proceeding under it, the General Assembly, on the 2d of June 1834, agreed to transmit to presbyteries certain regulations, which at the same time they converted into an interim

act. It is not necessary now to bring before your Lordships the whole of those regulations. It may be stated generally, that by the *first* of these provision is made for the presentee preaching in the parish church. By the *second*, it is ordered that, on the day appointed for moderating in the Call, the presbytery shall, in the first instance, proceed in the same way in which they are in use at present to proceed. By the *third*, that if no special objections are given in by the major part of the male heads of families, being members of the congregation, and in full communion with the church, according to a list or roll to be made up in manner there directed, the presbytery shall go on with the trials and settlement of the presentee according to the established rules of the Church. By the *fourth*, that it shall be competent to any one or more of the heads of families in the parish, in full communion with the Church, by themselves, or by an agent duly authorized, to state any special objections to the settlement of the person presented, of whatever nature such objections may be; and that, if the objections appear to be deserving of deliberate consideration or investigation, the presbytery shall delay farther proceeding, and give notice to all parties concerned to attend, that they may be heard. By the *fifth* and *sixth*, provision is made for the disposing of those special objections, whether such as to require procedure by libel or formal charge, or such as may be disposed of in a more summary manner.

The seventh and following regulations to the thirteenth, inclusive, more immediately touch the present question. It is provided by the *seventh*, that if it shall happen that, at the meeting for moderating in the Call, dissents are tendered by any of the male heads of families, being members of the congregation and in full communion with the Church, without the assignment of any special objections, such dissents shall be either personally delivered in writing by the persons dissenting, or taken down from their oral statement by the moderator or clerk of the presbytery. By the *eighth* it is provided, that if the dissentients do not amount in number to the major part of persons standing on the roll, and if there are no special objections remaining to be considered, the presbytery shall proceed to the trials and settlement. By the *ninth*, if it appear that dissents have been lodged by an apparent majority of the persons on the said roll, the presbytery shall adjourn the proceedings to another meeting, to be held not less than ten days, and not more than fourteen days thereafter. By the *tenth* it is provided, that if the presbytery deem it expedient, and the person presented be willing, or if he should desire so to do, the presbytery shall appoint him to preach to the congregation in the interval. By the *twelfth*, that in case the presbytery at the second meeting find that the major part of the persons en-

titled to dissent do not adhere to their dissents, or if there be not truly a majority of such persons on the roll dissenting, they shall sustain the Call, and proceed to the trials and settlement. By the *thirteenth*, that, in case the presbytery shall at that meeting find there is a majority of persons on the roll still dissenting, it shall be competent for the presentee, or any member of presbytery, to require all or any of the persons so dissenting to appear before the presbytery, or a committee of their number, at a meeting to be appointed, to declare in terms of the resolution of the General Assembly ; and in the event of any party failing to appear, or refusing to declare in the terms required, his name shall be struck off the list of persons dissenting. By the *fourteenth*, “ if the presbytery shall find that there is at last the major part of the persons on the roll dissenting, they shall reject the person presented, so far as regards that particular presentation, and the occasion of that vacancy in the parish ; and shall forthwith direct notice of this their determination to be given to the patron, the presentee, and the elders of the parish.”

The next regulations are intended for the case of successive presentations by the patron, and for the case of *jus devolutum* ; as to which last it is enacted, that where the presbytery present the case shall not fall under the operation of the regulations proposed ; but shall be proceeded with according to the general laws of the Church, under this provision, that any person previously rejected shall be considered as disqualified to be presented to the parish *on the occasion of that vacancy*.

The remaining regulations are made for the purpose of the proper adjustment or revision of the roll of the male heads of families, members of the congregation, and in full communion. And by the last regulation, it is recommended that the presbyteries of the Church should use their utmost endeavours to bring about harmony and unanimity in the congregation ; and be at pains to avoid every thing that might excite or encourage unreasonable exceptions in the people against a worthy person that might be proposed to be their minister.

The regulations thus presented to the General Assembly were also transmitted as an overture to presbyteries for their opinion ; and converted, like the more general declaration and enactment, into an interim act.

A short time after these interim acts had been passed, the parish of Auchterarder became vacant ; and on the 14th October 1834, there was laid on the table of the presbytery of Auchterarder, a presentation from the Earl of Kinnoull, in favour of Mr Young, a licentiate of the Church, accompanied by the proper certificates. The presbytery met, and on the 27th of October, they proceeded, with reference to the interim act of Assembly, and re-

lative regulations, to sustain the presentation, in so far as to appoint a day for moderating in a call to Mr Young; and, in terms of the first regulation, appointed two successive days for Mr Young's preaching, and the 2d of December for moderating in the Call. On the 2d of December the presbytery met, and received a regular report that Mr Young had preached on the days appointed; and after the ordinary procedure, and public worship as usual, there was produced and read a Call to Mr Young, to be minister of the Church and parish; and an opportunity was given to the heritors, and elders, and heads of families, and other parishioners to sign it. The Call was signed for Lord Kinnoull, by his factor, and by two persons, heads of families. No special objections were given in. The roll of the male heads of families was then produced. An objection was stated to it, as not having been made up within the time, or in the manner prescribed by the act of Assembly. The presbytery, repelling this objection, proceeded to give the parties on the roll an opportunity of stating their dissent; upon which certain persons did personally state their dissent and disapproval of the presentee. Their names were taken down by the presbytery, and they formed a large majority of the heads of families on the roll. The Presbytery then found, in terms of the ninth regulation, that dissents had been lodged by an apparent majority, and adjourned their proceedings till the 16th of the same month. On the 16th they again met, and, in terms of the twelfth regulation, proceeded to ascertain whether a majority of the persons entitled to dissent still adhered to their dissents. No dissents were withdrawn, and, notwithstanding of opportunity offered in terms of the thirteenth regulation, no requisition was made for all or any of the persons dissenting, to appear and declare in terms of the act of Assembly. *The Presbytery accordingly again found that a majority of persons on the roll still dissented.*

It were needless to trace the proceedings more in detail. Appeals had been taken against some of the proceedings of the presbytery, which were brought before the synod, and, finally, before the General Assembly. But these appeals were successively dismissed; and, on the 7th of July 1835, the presbytery of Auchterarder, having met and considered the previous proceedings, together with the sentence of the Assembly, confirming their judgments,—*they rejected Mr Young, the presentee to Auchterarder, so far as regarded that particular presentation on their table, or the occasion of this vacancy in the parish*, and directed their clerk to give notice of this determination to the patron, the presentee, and the elders of the parish of Auchterarder.

It is this decision of the presbytery, which has not since been brought under the review of any of the Church Courts, that has given

rise to the action now before the Court ; and it is of essential importance to attend to the nature of the action, and the conclusions as in the Amended Summons of Declarator. The pursuers were themselves satisfied that, as originally laid, it could not be maintained, and, therefore, found it necessary to amend their Summons. It is not requisite, however, to recur to the objections to which, in its original shape, the action was liable. The defenders will take the case in its present and amended shape.

The Summons then, after narrating the statutes 1567, chap. 7, 1592, chap. 116, 1592, chap. 117, and the 10th of Queen Anne, chap. 12, and the proceedings of the presbytery of Auchterarder, goes on to state, that the judgments or deliverances of the presbytery, of date 2d December 1834, and 7th July 1835, were *ultra vires*, illegal, and unwarrantable, in so far as, “ that, “ though by the laws and statutes before libelled, the presbytery “ were bound and astricted to make trial of the qualifications of “ the pursuer, Robert Young, as presentee to the Church and parish of Auchterarder, and were not entitled to delegate to, or devolve that duty on third parties, or to denude and abandon their “ right and duty, as a Church Court, to judge of, and decide upon, “ the qualification and fitness of the presentee for the pastoral office “ and charge ; and after examination, by the said presbytery, if “ the pursuer, the said Robert Young, as presentee aforesaid, was “ found to be duly qualified, the said presbytery were bound and “ astricted, as aforesaid, to have admitted and inducted him into the “ office of minister of the Church and parish of Auchterarder :” Nevertheless, though he is duly qualified as a licentiate and presentee, as well as in all other respects, to be received and admitted minister of the church of Auchterarder, “ and though no “ objections have been stated against his qualifications, the presbytery not only refused, and continued to refuse, to take the pursuer upon trials, and to pronounce judgment on his qualifications “ as presentee, or to admit and receive him as minister of the “ church and parish of Auchterarder, but have, by their sentence, rejected him as presentee to the said church and parish, “ without trial, without taking cognizance of his qualifications as “ presentee, and, expressly, on the ground that they cannot and “ ought not to do so, in respect of a veto of the parishioners ; in “ all which respects, the said presbytery and the individual members thereof have exceeded the powers conferred on them by law, “ and acted illegally, in violation of their duty, and of the laws and “ statutes libelled, and that to the serious prejudice of the patrimonial rights of the pursuers.” *Therefore, it concludes,* to have it declared “ that the pursuer, the said Robert Young, has been legally, validly, and effectually presented to the church and parish “ of Auchterarder ; that the presbytery of Auchterarder, and the

“ individual members thereof, as the only legal and compe-
 “ tent court to that effect, by law constituted, were bound and
 “ astricted to make trial of the qualifications of the pursuer, and
 “ are bound still so to do ; and if, in their judgment, after due
 “ trial and examination, the pursuer is found qualified, the said
 “ presbytery are bound and astricted to receive and admit the
 “ pursuer, as minister of the church and parish of Auchterarder,
 “ according to law ; That the rejection of the pursuer by the said
 “ presbytery, as presentee aforesaid, without making trial of his
 “ qualifications in a competent and legal form, and without any ob-
 “ jections having been stated to his qualifications, or against his ad-
 “ mission as minister of the church and parish of Auchterarder,
 “ and, expressly, on the ground that the presbytery cannot and
 “ ought not to do so, in respect of a veto of the parishioners, was
 “ illegal and injurious to the patrimonial rights of the pursuer,
 “ and contrary to the provisions of the statutes and laws libelled.”

Assuming judgment to be pronounced in terms of this conclusion,
 the Summons proceeds : That it should be found and declared
 that the pursuer, Mr Young, has just and legal right to the sti-
 pend, manse, and glebe, and other emoluments belonging to the
 church and parish, together with subsidiary conclusions against
 the collector of the Ministers' Widows' Fund, in whom, by law, the
 stipend of the vacant parish is vested ; and against the heritors of
 the parish for payment of the stipend. There are alternative con-
 clusions also, by which, after a similar general finding that the
 presentation is effectual, and that the presbytery of Auchterarder
 had illegally, and in violation of their duty, and of the laws and
 statutes libelled, rejected the pursuer, Mr Young, as presentee, it
 is sought to have it found that the presbytery and the collector of
 the widows' fund have no right to the stipend, but that the diffe-
 rent heritors should be ordained to make payment of the stipend
 to the pursuer, Lord Kinnoull, as patron.

Your Lordships will observe that the *only* parties now before
 the Court are the pursuers, on the one hand, and the *presbytery*
 of Auchterarder on the other. The collector of the widows' fund,
 and the heritors of the parish have been also called as defenders ;
 and important questions, in the event of your Lordships sustaining
 the general plea of the pursuers, will remain to be discussed with
 them. *But at present*, and because the pursuers wished to avoid
 certain objections which had been taken to the form of the action,
 the case is to be considered *with the presbytery alone*. Your
 Lordships, therefore, have no concern with any conclusions as to
 the application of the stipend. The only party before you as de-
 fender is the presbytery, and the only question is the general ques-
 tion with the presbytery, as raised by the first declaratory conclu-
 sion, namely, Whether the presbytery, in proceeding in terms of the
 Act of Assembly of 1834, to refuse to sustain the Call in favour

of Mr Young, as a sufficient and adequate Call, had or had not acted illegally and in violation of the laws of the Church, and the statute law of the land, and can be declared by this Court to be still bound, without respect to the proceedings which have taken place, to take the presentee on trial, and if found qualified, admit him minister of the parish.

It is of great importance in the outset,—and it is for that reason I have recapitulated the circumstances of the case—that the Court should have a clear view of what is the subject matter of debate, so as to exclude many irrelevant and unimportant topics most unnecessarily introduced.

The action is purely and simply an action of declarator against the legality of the proceedings of the presbytery under the act of Assembly referred to, which terminated in rejecting Mr Young's presentation. It will be remarked, in particular, that there is no conclusion that the *Right of Patronage* had *not* devolved on the presbytery. There is no conclusion for *interdict* against the presbytery's proceeding with the presentation or settlement of *any other party*. *There is no demand for decree to enforce* the presbytery's performance of what the pursuers state to have been their duty. The conclusions under consideration are simply and purely declaratory. The Dean of Faculty, indeed, has spoken much of his right to demand interdict, and of the means by which the decree of the Court, declaring the duty of the presbytery in the circumstances, may be enforced; and he has maintained that these were matters simply of remedy, which it was not necessary for the pursuer in this action to have insisted on, and which were totally distinct from the declarator of their right,—that, if they succeeded in obtaining judgment declaratory of the duty of the presbytery, he might afterwards apply for interdict, or for a decree in such terms as to admit of its being enforced by ordinary process of law—but that the remedy was one thing, and the right was another, and he could not be prevented from having the right declared, merely because he had not, in the same action, introduced the conclusions which were necessary for its enforcement. The defenders undoubtedly did not object to the action, on the ground that it was a declarator, although they considered the nature and scope of the declaratory conclusions to be of the greatest importance. With reference, however, to the questions raised in regard both to the jurisdiction of the Court, and the competency of the action, the explanations which have been given of the proposed remedies by which the right contended for by the pursuers may be enforced will be afterwards considered, and are very material, indeed, for determining how far there is *either* jurisdiction in this Court to sustain such an action as the present, *or*, admitting this jurisdiction, how far its conclusions are in themselves competent.

The points which have been successively raised in this debate

have led to an extensive examination into the history and laws of the Church of Scotland, and the proceedings of her courts and legislature, as these have been affected by the views of the different parties that from time to time have predominated in her counsels. On entering upon this subject, I am happy to state that I agree with my learned friend the Dean of Faculty,—and it was with great satisfaction I heard the clear and ample terms in which he enounced the proposition,—that the Church of Scotland is dependent on the State. With him I entirely disclaim, and utterly reject the doctrine of compact, or, as it has been elsewhere termed, Alliance between Church and State. My learned friend who opened the case for the pursuer took, in *his* address, a view of this question which has since been abandoned; but he has little occasion to regret, that his able though respectful argument shall have failed in establishing what has foiled the extraordinary talent, and vast erudition, and consummate arrogance of the Bishop of Gloucester. When I say that the Church of Scotland is dependent on the State, I do not mean to speak of the Church of Scotland in a spiritual sense, as forming part of that universal church which consists of all the elect in every age and climate, and under all denominations,—that Church to which the promises were made, and which is assured of the guidance of the Spirit,—I speak of the Church of Scotland as a national *establishment*, possessed of privileges and immunities, endowed with property, having an orderly gradation of judicatories in Sessions, Presbyteries, Synods, and General Assemblies, and invested with high judicial, and not judicial only but legislative powers. The Church of Scotland in this last sense, as regards its privileges as an establishment, I agree with my learned friend who last spoke, is dependent on the State; it is the creature of the State: it derives its being and existence from the State; and I should not know how to address myself to your Lordships in this case, if the necessity of argument constrained me—I do not say to deny—but not distinctly and explicitly to avow a proposition so important to the constitution.

But, agreeing in this proposition, I cannot admit that your Lordships are to find in a few acts of Parliament only, all the laws and constitution of the Church of Scotland. For her laws and constitution we must look not only to the statute books of Parliament. We must look farther to the statute book of the Church, for she, as well as Parliament, has her statute book. We must look farther still and beyond this, to the unwritten as well as the written law of the land, to what custom and immemorial use and practice have established.

Turning, in the first instance, to the records of Parliament, it will be found that the statutes do not contain merely a meagre recognition of the kirk to spiritual effects only, or with a nice and exact definition of the bounds and confines of her jurisdiction.

On the contrary, there will be found a general acknowledgment of a church possessed of ample powers of self-government, an acknowledgment of an *existing* discipline, and judicial and legislative powers, all of which are sanctioned and adopted by Parliament. We shall afterwards examine the particular case of patronage; but in the meantime it is essential to consider generally the constitution of the Church, as explained in the written and unwritten law of the Church, and of the land.

Your Lordships' attention may be here directed, in the first instance, to the act of 1567, ch. 3, which acknowledges and ratifies an act passed in 1560, and ordains and re-enacts it of new; and that act embodied and gave the sanction of Parliament to the Confession of Faith and doctrine, as then believed and professed by the Protestants in Scotland, rescinding all statutes in times by-past contrary to that confession, and inconsistent with it as a doctrine grounded on the word of God. By the 6th chapter of the same Parliament it is declared, that "the ministers of the blessed Evangel, whom God in his mercy has now raised up among us, or hereafter shall raise, agreeing with them that now live, in doctrine and administration of the sacrament, and the people of the realm that profess Christ as he is now offered in his Evangel," &c. "are the only true and haly Kirk of Jesus Christ within this realm;" and decerns and declares, that all and sundry gainsaying the word of the Evangel received and approved as the heads of the Confession of Faith by Parliament in 1560, shall be no members of the Kirk, as professed within the realm. It is by the 7th chapter of the same Parliament, which has been so much founded on in this discussion, that the examination and admission of ministers within this realm is declared to "be only in the power of the Kirk now openly and publicly professed within the same," reserving to lay patrons their right of presentation. In 1579, ch. 68, Parliament again, by solemn recognition, ratifies and approves the previous acts in favour of the liberty and freedom of the true Kirk of God, and religion now presently possessed within this realm, together with the Confession of Faith of 1560; and by ch. 69, the Parliament declares and grants jurisdiction to the Kirk in the preaching of the true word, in the correction of manners, and administration of the sacraments; and declares that there is no other "face of Kirk, nor other face of religion, than is presently by the favour of God established within this realm, and that there be no other jurisdiction ecclesiastical acknowledged within this realm, other than *that which is*, and shall be within the same Kirk, or that which flows therefrom concerning the premises." The Parliament held in 1581 by ch. 99, again acknowledged and ratified the previous acts of Parliament in favour of the Church; and in 1592, ch. 116, was pronounced that still more solemn recognition which, because it

makes particular reference to kirk-sessions, and to presbyteries, as well as synods, and General Assemblies, has been termed the charter of presbytery. It were a great mistake, however, to suppose that presbytery was introduced by the statute 1592. Presbytery, in the proper sense of that term, was coeval with the Reformation,—it was synonymous with “eldership,” though at first constituted only in provincial synods, and General Assemblies, and not in the subordinate districts which are now termed presbyteries. The statute 1592, ch. 116, ratifies, and approves all liberties, privileges, immunities, and freedoms whatsoever granted to the true and holy church; and ratifies the General Assemblies appointed by the said kirk; and declares that “it shall be lawful “to the kirk and ministers, every year at the least, and oftener, “*pro re nata*, as occasion and necessity shall require, to hold and “keep General Assemblies.” Then follows a provision for the appointment of these General Assemblies by the King or his commissioners, and failing their appointment, by the General Assembly itself; and it farther ratifies and approves the synodical and provincial assemblies, “to be holden by the Kirk and ministers twice ilk year *as they have been, and are presently in use to do*, within every province of this realm;” and farther “ratifies and approves the presbyteries and particular sessions appointed by the said kirk with the hail jurisdiction and discipline “of the same kirk, agreed upon by his Majesty in conference had “by his Highness, with certain of the ministers convened to that “effect: of the whilk articles the tenor follows.” Then follows a statement of matters to be treated in provincial assemblies and in presbyteries. The statute then abrogates and annuls all acts of Parliament previously made in prejudice of the liberty of the true Church; and *inter alia* in this repealing part of the statute it is declared that the act of 1584, ch. 129,—an act which, as your Lordships are aware, was intended to strike at the powers claimed and exercised by the Reformed Church, “shall noways be prejudicial, nor derogate any thing to the privileges that God has “given to the spiritual office-bearers in the kirk, concerning “heads of religion, matters of heresy, excommunication, *collation*, “*or deprivation of ministers*, or any siclike essential censours specially grounded, and having warrant of the word of God.” It proceeds more particularly to abrogate an act passed in the same year, 1584, commissioning the bishops, and other judges constituted in ecclesiastical causes, to give collation to benefices, and put order in all causes ecclesiastical; and ordains all presentations to benefices to be directed to the particular presbyteries in all time coming, “with full power to give collation thereupon, *and to put order to all matters, and causes ecclesiastical within their bounds, according to the discipline of the Kirk*: Providing the foresaid

“presbyteries be bound and astricted, to receive and admit what-
 “somever qualified minister, presented by his Majesty, or laic pa-
 “trons.”

The next act, ch. 117, provides that sentence of deprivation by presbyteries, synods, and General Assemblies, shall cause the benefice to become vacant, and that the right of presentation shall fall to the presbytery, *jure devoluto*, in the event of the patron not presenting within the space of six months thereafter; and declares that, in case the presbytery refuse to admit any qualified minister presented to them by the patron, it shall be lawful to the patron “to retain the whole fruits of the benefice in his own hands.”

There are various other statutes containing from time to time a recognition of the Church, and regulating various matters in which her rights and interests are concerned; but for the present purpose of my argument it is unnecessary, perhaps, to do more than to refer to the statute of the first Parliament of William and Mary, ch. 5, which proceeds on the narrative, that “the King’s and Queen’s
 “Majesties, and the three Estates of Parliament, conceiving it to be
 “their bound duty, after the great deliverance which God hath lately
 “wrought for this church and kingdom, in the first place to settle and
 “secure therein, the true Protestant religion, according to the truth
 “of God’s word as it hath of a long time been professed within this
 “land; as also the government of Christ’s church within this nation,
 “agreeable to the word of God, and most conducive to the advance-
 “ment of true piety and godliness, and the establishing of peace
 “and tranquillity within this realm; and that by an article of the
 “claim of right, it is declared, That Prelacy, &c. is and hath been a
 “great and unsupportable grievance and trouble to this nation, and
 “contrary to the inclinations of the generality of the people ever
 “since the Reformation, *they having reformed from Popery by*
 “*Presbyters*, and therefore, ought to be abolished,” and that by an
 act of the last session it was abolished. Upon this narrative, the statute proceeds to ratify and perpetually confirm all laws and statutes made against Popery and Papists, and for the maintenance of the reformed religion, and for the true Church of Christ within this kingdom; more especially their majesties and the three estates of Parliament “ratifie and establish the Confession of Faith, now read
 “in their presence; and voted and approven by them as the public and
 “avowed confession of this Church, containing the sum and substance of the doctrine of the reformed churches, (which Confession of Faith is subjoined to this present act.) As also they do
 “establish, ratifie, and confirm the Presbyterian Church government
 “and discipline; that is to say, the government of the Church by kirk-
 “sessions, presbyteries, provincial synods, and general assemblies,
 “ratified and established by” 1592, ch. 116, “and thereafter received by the general consent of this nation to be the only government of Christ’s Church within this kingdom; reviving, renew-

“ing and confirming the foresaid Act of Parliament, in the whole
 “heads thereof, except that part of it relating to patronages, which
 “is hereafter to be taken into consideration.”

Among other articles of the Confession of Faith thus ratified and approved, it is declared by chap. 31—“For the better government, and further edification of the Church, there ought to be
 “such assemblies, as are commonly called synods, or councils. As
 “magistrates may lawfully call a synod of ministers, and other fit
 “persons, to consult and advise with, about matters of religion; So,
 “if magistrates be open enemies to the Church, the ministers of
 “Christ, of themselves, by virtue of their office; or they with other
 “fit persons, upon delegation from their churches, may meet together
 “in such assemblies. It belongeth to synods and councils, ministerially to determine controversies of faith, and cases of conscience, *to set down rules and directions* for the better ordering of
 “the public worship of God, *and government of his Church*;
 “to receive complaints in cases of mal-administration: and authoritatively to determine the same: which decrees and determination, if consonant to the word of God, are to be received with reverence and submission; not only for their agreement with the
 “word, but also for the power whereby they are made, as being
 “an ordinance of God, appointed thereunto in his word.”

It is unnecessary at present to refer to the act 1690, chap. 23, by which patronage was abolished, and the right of presenting given to the heritors and elders, subject, under certain limitations, to the approbation or disapprobation of the people; or to the act of Queen Anne 1711, by which patronage was ultimately restored. The statutes already referred to show, that it is impossible to take the most general survey of the statute book, without seeing the fallacy of any argument that would rest upon the two or three statutes alone that have been quoted, as explaining and defining the constitution of the Church. These statutes refer to an existing discipline,—they refer to presbyteries, synods, and assemblies already in existence, and exercising known and acknowledged powers. They do not create but recognise an established order of things. Their language in itself is too vague to have been used if it had been their object to create, and not merely to acknowledge and ratify an actual constitution. To see, therefore, what it is that the Parliament approved and ratified, your Lordships must look to the practice of the Church herself, and to her records, and must find in her statute books and in her practice, the more exact definition and explanation of that constitution which the Parliament generally, and by reference, sanctioned and ratified. It is only by referring to the history of the Church, and examining the various ways in which the Church has exercised her judicial and legislative powers, that your Lordships can know and

see what is the form and extent of her constitution, and to what matters it extends, many of them trenching deeply on civil rights, though all of them having reference to her own internal regulation.

Thus although, adverting to the practice of the Church as contrasted with these statutes, it may be remarked in illustration, that neither the act 1592, c. 116, nor I believe any other statute, contains any definition of the powers of the General Assembly; yet who denies that the General Assembly has powers, well understood in practice, and well defined; and how are these powers sanctioned by the State, except through the general recognition contained in these statutes in favour of the Church and of her Assemblies, with reference to the order and discipline actually existing when these statutes were passed? It is not a case in which the powers are especially defined by statute, or to be spelled out as a matter of construction; it is a case in which the statute sanctions certain powers, the exercise of which had been previously asserted. As another instance of the same kind, and to show how vague the statutes are, if the practice of the Church be put out of view,—how necessary it is, in short, to look, not to the written, but the unwritten law of the land in the matter,—it may be observed, that there is no power of deposition expressly conferred upon presbyteries. It is given only to the higher Assemblies; yet the power of presbyteries to depose is indisputable; and the statute 1592, ch. 117, assumes them to have such power, though not conferred upon them by the statute or any of the previous acts of Parliament.

To take another and still more important illustration, there is no authority in the act 1592, called, as it is, the Charter of Presbytery, or in any other statute, for *ruling elders* being constituent members of the judicatories of the Church, particularly of the synods and assemblies; and a great discussion, as your Lordships must be aware, arose with reference to this subject in the Assembly held in Glasgow in 1638, when it became an object with the Court to dispute the right of the laymen claiming to sit in that Assembly as representatives of presbyteries, because the views of the laymen were strongly opposed to the Court; and, except by displacing them, the Assembly was beyond the reach of Court influence. The objections, however, then made to the right of the lay-representatives were repelled; and if any thing be now fixed beyond question in the law of the Church, it is, that the synods and General Assemblies shall consist in part of laymen, chosen by their respective presbyteries. The statute book, however, is silent on this most important part of the constitution of the Church,—a part so important that the character of the Church of Scotland, in her Assemblies, her usefulness, her powers of influencing the people, depend in part on this peculiarity of her constitution, which saves her in her judicatories and councils from the evils and

abuses of priesthood, and unites her institutions and proceedings, her judgments and her orders, with the business of life, and with the ordinary feelings of mankind.

What shall be said to another instance of the legislative powers of the Assembly as to matter not of internal regulation only, but affecting the constitution itself of the Church? The statute 1592 gives no power to the Assembly to vary its constituent members, which, besides, are no where discoverable in any act of Parliament; and yet the Assembly has, from time to time, laid down special schemes of representation, more particularly by the act 1694, ch. 5, and by the act 1712, c. 6, by which the Assembly successively fixed the proportion which the representatives of the several presbyteries should bear to the number of parishes within the presbytery, and that with reference to the number both of ministers and of ruling elders.

It is difficult to conceive any instance of greater power in matter of internal legislation than that by which the Church is enabled to affect the constitution of her supreme judicial and legislative council. But this is not all. At an early period, the General Assembly of her own authority admitted representatives from the church of Campvere. In 1699, she admitted representatives from Darien, and the same power was exercised so recently as 1821, in the case of the representatives then admitted from the presbytery of India. Farther, the Church has from time to time exercised the power, independently of any civil judicatory, of separating and dividing presbyteries and parishes. She separated Shetland from Orkney; and, in 1725, divided Orkney into three several presbyteries. Yet there is not to be found in the acts of Parliament the slightest vestige of such powers, which, depending no doubt upon the State, and to be referred ultimately to the State, and to the will of Parliament, were granted only by that general sanction and recognition which Parliament gave to the constitution of the Church, as established by practice, and existing at the time when these several statutes were passed.

From time to time the General Assembly has made regulations with respect to plurality of offices, prohibiting the holding of benefices with cures, or prohibiting cures to be held with offices not cures, but which are inconsistent with the proper discharge of the pastoral duty.

In respect of the qualification of ministers, she has legislated repeatedly and very extensively, in 1596, in 1638, in 1711, in 1779, and in 1799. She has passed repeatedly acts in regard to simony and simoniacal practices. She has passed various enactments relative to the solemnization of marriage, which have been recognised by the civil courts. She has legislated over and over again with respect to the education of her probationers.

It is in truth a great fallacy to assume that the Church of Scotland had no existence till 1592, or even 1560. The Church of Scotland existed previously to the Reformation. By the Reformation it became a reformed church, changing its doctrines from those of Popery to Protestantism; and its government from that of Prelacy to Presbytery. But the changes in the doctrine and the polity did not make a new church, as if no church had previously existed known to the law. The Church remained, but as a reformed Church. The property which as a reformed Church she possesses, belonged to her previously to the Reformation; though in the revolutionary movements which were consequent on that great event, she was despoiled of a great part of her property, as she abolished the hierarchy. But it is this circumstance, that there was the existing and continuing Church, that makes so important in all these general statutes, the recognition of her powers, judicial and legislative, with reference especially to that form which they had assumed, as the statutes say, “by the consent of all the people living in this land, for the purpose of better doctrine in religion, and better discipline in the Church.” When your Lordships are, therefore, called to consider what are the powers of the Church with respect to collation and admission of ministers, to what extent, more especially, the Church has it in her power to regulate the Call,—for we shall see immediately that the Call is, and has always been, an essential part in the admission and collation of a minister,—it is necessary to enter into the consideration of the subject in regard to a church invested with high judicial and legislative powers, not precisely defined by any acts of Parliament, but the extent of which is to be discovered in their operation, by the varied and important acts which, in the exercise of them, she has from time to time performed.

When the statutes 1567 and 1592, ch. 116, are referred to, it will be kept in view, that the privileges which they recognise, rather than bestow, exist in a church endowed with such judicial and legislative powers. By the former of those statutes, it is expressly declared, that “the examination and admission of ministers within the realm, be only within the power of the kirk, now openly professed within the same, the presentation of laic patrons always reserved to the just and ancient patrons;” and by the latter, the Church is declared to have full power to give collation, and to put order to all matters and causes ecclesiastical within her bounds, according to the discipline of the Kirk, under the provision that she should be bound and astricted to receive and admit whatever qualified minister should be presented by his Majesty or lay patrons.

Let us see then what has been the practice followed by the Church, and what enactments exist in her statute book with refer-

rence to this matter, the admission and collation of ministers, which, under reservation of the right of patronage, is thus ecclesiastically conferred on her: and the first point here to be made,—and I state it with confidence,—is, that by the law of the Church, and of the land, a Call is an essential part of the procedure towards the admission and induction to the kirk.

I own I was somewhat surprised, that the Dean of Faculty, in a speech of so much power, learning, and research, did not attach more importance to the subject of the Call; for whether it has come to be a necessary step in the induction, on the principle that none should be intruded into a parish contrary to the will of the congregation, or that acceptableness to the people comes to be held as among the proper qualifications of the candidate, of which the Church is the exclusive judge, one thing is certain, that without a call no minister can be settled in his parish. It is essential that there should be a Call. The Veto Act professes to regulate the Call, and, therefore, it is of the last consequence, in considering the legality of that statute of the Church of 1834, to look to the Call itself, and to the right which the Church possesses, as recognised by the state, to be vested with judicial and legislative powers, to define and regulate the Call by judicial decision, or by legislative enactment. There is no mention of the Call in the statute of presbytery; and, therefore, it has been said that the Call can be no part of the law of the land,—no part of the law of the Church which the civil courts are bound to acknowledge or act on. I answer, that, adopting such a mode of reasoning, one-half, and more than a half of the privileges of the Church would be disallowed; and she would be rendered more bare of honour and prerogative than even any ordinary corporation, whose privileges may be asserted and ascertained by an appeal to the general practice of the constitution. If the Call be shown to be a part of the law of the Church, it is necessarily a part of the law of the land; because the law of the Church is recognised by the state; and, if the Veto Act, in regulating that call, has not exceeded the bounds within which the Legislature of the Church is circumscribed, it is impossible in a civil court, any more than in a church court, to deny the lawfulness of its enactments.

The Second Book of Discipline is one of the undoubted standards of the law of the Church, wherever it is not inconsistent with the acts of Parliament, by which I admit it must be qualified; and, being the standard of the Church recognised by the State, I conceive it becomes a part of the law of the land. In the Second Book of Discipline, chapter 3, we find it laid down, that, in the appointment of ministers, there must concur the consent of the congregation, “to whom the person or persons beis appointed;” and that no one should be intruded in any office of the kirk,

“contrar to the will of the congregation, to whom they are ap-
 “pointed.” It is true, that the right of election is claimed for
 the eldership; and I do not mean to maintain that any claim which
 is to be found in this book is to oust the law of the land, in regard
 to the rights of patrons, which by express statute are saved; but
 wherever, as in the instance of this principle of non-intrusion,
 the rule of the Church is consonant with the law of the land, the
 principle is recognised in the general recognition of the Church; and
 therefore, I assume it as a general position, which must be admit-
 ted to be law, that none should be intruded in opposition to the
 will of the congregation. By an Act of Assembly passed in 1596,
 and which is found recorded in the proceedings of Assembly 1638,
 the same general principle is recognised as an essential point on
 the part of the Church. Thus, in speaking of the corruptions of
 the office, it is declared, “That the intrant shall be posed upon
 “his conscience, before the great God, (and that in most grave
 “manner,) what moveth him to accept the office and charge
 “of the ministrie upon him. That it be inquired, if any by solis-
 “tation, or moyen, directly or indirectly, prease to enter in the
 “said office: And, if it bee found, that the solister be repelled; and
 “that the Presbyterie repell all such of their number from vot-
 “ing in the election or admission, as shall bee found moyeners for
 “the soliciter, and posed upon their conscience to declare the
 “truth to that effect. Thirdly, because by presentations, many
 “forcibly are thrust into the ministry, and upon congregations, that
 “utter thereafter that they were not called by God: It would bee
 “provided, that none seeke presentations to benefices, without ad-
 “vice of the presbyterie within the bounds whereof the benefice
 “is, and if any doe in the contrarie, they to be repelled as *rei*
 “*ambitus*. That the tryall of persons to be admitted to the minis-
 “trie hereafter, consist not only in their learning and abilitie to
 “preach, but also in conscience, and feeling, and spirituall wisdom,
 “and namely in the knowledge of the bounds of their calling, in
 “doctrine, discipline, and wisdom, to behave himselfe accor-
 “dingly with the diverse ranks of persons within his flock, as
 “namely with Atheists, rebellious, weak consciences; and such
 “other, wherein the pastorall charge is most kythed; and that he
 “be meet to stop the mouthes of the adversaries: and such as are
 “not qualified in these points to be delayed to further tryall; and
 “while they be found qualified. And because men may be found
 “meet for some places, who are not meet for other, it would be
 “considered, that the principall places of the realme be provided by
 “men of most worthie gifts, wisdom, and experience, and that
 “none take the charge of greater number of people nor they are
 “able to discharge: And the Assembly to take order herewith, and
 “the Act of the provinciall synod of Louthian made at *Linlithgow*

“ to be urged. That such as shall be found not given to their
 “ book and studie of Scriptures, not carefull to have books, not
 “ given to sanctification and prayer, that studie not to bee powerful
 “ and spirituall, not applying the doctrine to corruptions, which
 “ is the pastorall gift, obscure and too scholastick before the peo-
 “ ple, cold, and wanting of spiritual zeal, negligent in visiting
 “ of the sick, and caring for the poore ; or indiscreet in choosing of
 “ parts of the word not meetest for the flock, flatterers and dissem-
 “ bling at public sins, and specially of great personages in their
 “ congregations, for flattery, or for fear, that all such persons bee
 “ censured, according to the degree of their faults, and continuing
 “ therein, bee deprived.”

In the acts of Assembly 1638, session 23 and 24, it is by article 20th expressly stated, “ Anent the presenting either of Pastours, or
 “ Readers, and Schoolmasters, to particular Congregations, that
 “ there be a respect had to the Congregation, and that no person
 “ be intruded in any office of the Kirke, contrare to the will of the
 “ congregation to which they are appointed ;”—“ *The Assembly
 “ alloweth this article.*” That is to say, the Assembly of 1638 not
 only acknowledged this to have been a principle declared by pre-
 vious Assemblies, but adopt and reassert the principle.

In 1649 patronage was abolished ; and the General Assembly published a Directory for the election of ministers ; and it is not un-
 important to observe, how, upon that occasion, she proceeded, as
 throwing light upon the views of the Church in regard to this matter.
 The election at that time was in the session, popularly chosen, patro-
 nage being abolished, and there being no danger of intrusion by the
 presentee of a patron against the will of the people. The Church
 nevertheless allowed the disapproval of the majority of the congrega-
 tion to operate rejection, provided the congregation were not disaffected
 or malignant. On the other side of the Bar, it is contended that
 the disapproval then admitted was for objections stated, and by
 the Church held adequate. The passage, however, does not ap-
 pear capable of bearing this construction ; and seems plainly to
 import that the Church sustained a simple disapproval by the ma-
 jority without reasons, and not upon cause shown, or for reasons
 upon which the Church Courts reserved power to decide. The
 words are,—“ But if it happen that the major part of the
 “ congregation dissent from the person agreed on by the session,”
 (which, by that act, had the power of election) “ in that case, the
 “ matter shall be brought unto the presbytery, who shall judge of
 “ the same ; and if they do not find their dissent to be grounded
 “ upon causeless prejudices, they are to appoint a new election in
 “ manner above specified.

“ But if a lesser part of the session or congregation show their
 “ dissent from the election, without exceptions relevant and veri-

“fied to the presbyterie, notwithstanding thereof the presbyterie
“shall go on to the trials and ordination of the person elected;
“yet all possible diligence and tenderness must be used, to bring
“all parties to an harmonious agreement.”

It seems difficult to read these words and not to observe the marked distinction there laid down in the Directory, between a dissent by the majority, and a dissent by the minority of the congregation. In the former case, no doubt, the Church reserved it for consideration, whether the dissent was grounded on causeless prejudices; but otherwise there was no inquiry into the reasons which had dictated the dissent. It was only in the case of the minority that the exception was required to be relevant and verified to the presbytery; that is to say, to be such as the presbytery would take upon proof, and in itself,—as operating against the will of the majority,—term an adequate reason for refusing the settlement. The same Directory provides, that where a congregation is disaffected and malignant, in that case the presbytery should provide them with a minister, because in such circumstances as these, it was plain the congregation could not be trusted with the discretion of rejecting a candidate, if disagreeable to themselves; and, therefore, in that particular case, when the flock was tainted with malignancy, but in that case only, the Church reserved to itself the power of compelling the parish to receive a minister against the disapproval even of the majority of the congregation. In such a case, indeed, their disapproval must be held to have arisen exclusively from causeless prejudices. If the construction on the other side of the Bar had been correct, it would have been unnecessary to have introduced the different clauses which the Directory contains, for the case of dissent by the majority and minority. It would have answered all purposes, according to their views, to have provided simply, that no objection should be allowed to the minister elected by the session, except on cause shown, relevant and verified. The case of the majority is treated differently from that of the minority, solely because the rule of the Church in the two cases was different; the Church acting, in the former case, on the disapproval of the majority, unless the force of that was taken away by showing that it had arisen from causeless prejudices; and in the latter case, acting only where the minority objecting could show the sufficiency of the objection in point of law, and establish its truth in point of fact. And it will not be overlooked that the importance here attached to the wishes of the majority of the congregation in a case where the election of the minister was with the kirk-session, proves in a manner the most conclusive, the great importance which at that time, and which has all along attached to the wish of the congregation,

and to the great rule, that no one should be intruded against the will of the people. In truth, our early reformers went back to the older and purer times of the Church, in which, if it were necessary to go into antiquarian learning on the subject, it were easy to prove that the consent of the people had always been a constant requisite, that no election had been carried into effect without consulting the people,—that the concurrence of the people was thought essential in appointing a pastor over them. Various expedients may have been at different times resorted to for the purpose of superseding this rule, and reducing the concurrence to the lowest possible extent; but the necessity of the concurrence in the earlier ages of the Church was admitted; and in asserting the principle, that there should be no intrusion against the will of the congregation, and allowing such weight to disapprobation by a majority of the congregation, the Reformed Church of Scotland only adopted a principle, which certainly existed in the earlier ages of the Church, and which, carried more or less into effect, might be traced throughout its history.

It is not my intention, because I think it unnecessary for the argument, to follow my learned friends in their remarks on those dissensions which so much agitated the Church of Scotland after the act of 1711, under which the right of patronage was restored. The history of these dissensions have a certain bearing on the subject, in so far as they tend to show the strong, and, I should say, the inveterate opinion which prevailed in the Church, with respect to the right of the people to be heard in the choice of their pastor; but, as it has no immediate reference to the point now before the Court, I am unwilling to extend the discussion by adverting to it at all, the more especially that it is so fully and satisfactorily treated, not merely in some of the larger works connected with the history of the Church, but in that statement of the late Sir Henry Moncreiff, which, in the course of this debate, has been so frequently referred to. I shall not follow the example of the other side of the Bar, by reading to your Lordships detached passages from that work; because, when it has been so much appealed to, I am satisfied that your Lordships will peruse the whole of it with the attention which it requires, and which the course of argument adopted renders necessary on your Lordships' part for the decision of this case. I cannot but observe, however, that I have seldom known any document of the same importance, more unjustly used in argument. It has been very partially quoted; the sense of it very imperfectly brought out; those passages only founded on which seem to indicate some opinions favourable to the pursuers, and all the rest cast into the shade. There can be no better mode of correcting this unfairness, than by asking your Lordships to peruse the whole of it attentively; and when

the task has been performed, and it is one not ungrateful in itself, I have no doubt it will be seen, that the reverend and revered author held no opinions inconsistent with those which the presbytery of Auchterarder maintain. He certainly never maintained, nor do they maintain, the right of the people to elect their ministers ; but he as little assented as they do, to that course of judicial proceedings by which the Call was reduced to a mere mockery ; till at last requiring year after year, and one case after another, a subscription to the Call more and more insignificant, an Assembly was found so negligent of its duty as actually to sustain the sufficiency of a Call to which there was but one signature attached. There is not in the whole of that book, from beginning to end, a single sentence which could be turned, by any ingenuity of construction, into approbation of those proceedings. He gave up the case as hopeless, despairing to overcome the resistance of a party which then predominated in the Church ; but he never approved of those measures which had led to the overthrow of the older and purer principle of the Church, nor departed from the hope of rectifying one day, by legislative enactment, the erroneous practice to which a train of judicial decisions had given sanction.

But in passing over this period of the Church, it may be permitted, perhaps, to refer to such Acts of Assembly as that of 1732, ch. 8, and there are several such, in which the General Assembly make various enactments prescribing the mode by which vacant churches should be planted, where the presentation had fallen to presbyteries, *jure devoluto*, or by consent of those having interest. I do not quote the enactments, because they do not bear particularly on the case ; but I refer to them as showing that the Assembly have always asserted and exercised the power of regulating by general enactments the procedure of presbyteries in such matters ; and, that they did not confine themselves to decide judicially upon each case as it successively occurred ; but held themselves perfectly entitled to lay down a general rule or regulation which would guide all the presbyteries of the Church in conducting the settlement of a clergyman in particular circumstances. That the Assembly have powers to make an act binding the Church to this effect for a year, no one acquainted with the law of the Church can doubt ; and that that act becomes a law of the Church when, having been transmitted to presbyteries and received their sanction, it is re-enacted by the General Assembly, is a point equally clear, and which cannot be brought into question. All the cases, therefore, in which the Church by interim Act of Assembly, or by laws, regularly passed in terms of the Barrier Act, has provided a general rule for the guidance of presbyteries in the settlement of a minister, are strong confirmations of its right to make a similar enactment with reference to the Call.

But to follow more specially the enactments of Assembly as illustrating the great principle, that there should be no intrusion of a pastor against the will of the people, I might refer very particularly to the act 1736, ch. 14, in which, alarmed at the extensive secession of Ebenezer Erskine, and his followers, and with a view to bring back the straying flocks to the sheepfold of the Church, “ The
 “ General Assembly, considering from Act of Assembly, August 6,
 “ 1575, Second Book of Discipline, Chap. 3. Par. 4, 6, and 8, regis-
 “ trate in the Assembly books, and appointed to be subscribed by all
 “ ministers, and ratified by Acts of Parliament, and likewise the Act
 “ of Assembly 1638, December 17th and 18th, and Assembly 1715,
 “ Act 9th, That it is, and has been since the Reformation, the Prin-
 “ ciple of this Church, that no minister shall be intruded into any pa-
 “ rish contrary to the will of the congregation, do therefore serious-
 “ ly recommend to all judicatories of the Church to have a due
 “ regard to the said principle in planting vacant congregations ;
 “ and that all presbyteries be at pains to bring about harmony
 “ and unanimity in congregations, and to avoid every thing that
 “ may excite or encourage unreasonable exceptions in people against
 “ a worthy person that may be proposed to be their minister, in
 “ the present situation and circumstances of the Church, so as
 “ none be intruded into such parishes, as they regard the glory of
 “ God, and edification of the body of Christ.”

In this act, which is entitled, “ Act against the intrusion
 “ of ministers into vacant congregations, and recommendation to
 “ presbyteries concerning settlements,” the Second Book of Disci-
 pline is again expressly ratified, as containing the law of the Church,
 and authoritative of the great principle solemnly asserted, that no
 minister shall be intruded into a parish contrary to the will of the
 congregation. To say that this was an idle statute, that its au-
 thors intended nothing by it, or that no party expected anything
 from it, is an assertion for which there appears to be very little
 foundation. It may be very true, that the party which permitted
 that statute to pass did not imagine it diminished their power ; and
 that the party to whom it was granted as a boon might not have
 gained by it any great or practical advantage in the assertion of
 their peculiar principles ; but it still remains on the statute book
 of the Church, and it is in that view, and in that view itself, of
 value as a solemn recognition of the great principle which the
 party most in favour of patronage could not venture to deny,—
 which those who most maintained the right of the people to co-
 operate in the settlement of the minister were satisfied with having
 so declared, in the hope that better times might arise for carrying
 it into practical effect.

But what shall be said by those who would deny the existence

of the Call as really forming an essential part of the law and practice of the Church, when I turn to the enactments 1753 and 1759. In the former of these years an act, ch. 5, was passed against simoniacal practices; and the General Assembly declare, that if, upon inquiry, “it shall be found, that any minister or probationer hath obliged himself, or that his friends before his settlement, and in order to promote the same, have obliged themselves, upon the account of the candidate, that he shall not during his incumbency commence any process against the heretors for augmentation of stipend, reparation of manse, office-houses, or enlarging his glebe; or shall have become bound in any sum or sums of money, or any prestation to the patron, or persons connected with the patron, in order to procure the presentation, or to the heretors or others concerned, *in order to obtain a concurrence with the said presentation, or otherwise to procure a Call* to a vacant parish or has entered into any simoniacal paction or practice for that effect; that such presbytery lay a representation of the said matter before the General Assembly, that the Procurator for the Church may have orders to raise and carry on a process of reduction, of such bargains, or obligations before the Court of Session, and also the Assembly do hereby declare it a just cause of deposition in ministers, or of taking away the licence of a probationer; and ordain presbyteries to proceed to such sentences against all such ministers and probationers as shall be hereafter found to have either entered into such bargains themselves, previous to their settlements, or who shall after their settlements, homologate the deed of their friends, and do not immediately when they come to the knowledge of it, intimate the same to the presbytery of the bounds.”

Again, a similar act was repeated in 1759, in which it was expressly provided, that if, upon inquiry, it should be found that any minister or probationer, or his friends before his settlement, and in order to promote it, had obliged himself not to commence during his incumbency any process against the heritors, &c. or to become “bound in any sum or sums of money, or any prestation to the patron, or person connected with the patron, in order to procure the presentation, or to the heretors or others concerned, *in order to obtain a concurrence with the said presentation, or otherwise to procure a Call* to a vacant parish, or has entered into any simoniacal paction, or practice for that effect,” then the presbytery is directed to lay the matter before the General Assembly, that the Procurator of the Church may have orders to carry on the necessary legal proceedings; and the Assembly farther declare that such facts so proved, shall be a just cause of the deposition of ministers, or of taking away the license of probationers, “and ordain presbyteries to proceed to such sentence against all

“such ministers and probationers as shall hereafter be found to have entered into such practices themselves, previous to their settlement, or who shall after their settlement homologate the deed of their friends.” In the same act it is farther declared, that, if any such simoniacal practice should be carried on by any person whatever, in order to the promoting or procuring any benefice or office in the Church, to any minister or probationer, though without his consent or approbation, yet, if such minister or probationer should afterwards be told or informed of such practices, and should not intimate the same to the presbytery of the bounds, at their first meeting, after he has received the information, he should, if a minister, be deposed, if a probationer, be deprived of his license.

Is it possible, after these statutes, to doubt that the call is an essential part in the spiritual induction of a minister, when you find the church in defining simony, and there can be no doubt of its right to regulate its discipline in that matter, declaring, that any obligation granted by a candidate or probationer or his friends to procure concurrence to a call, shall constitute simony, shall be held to annul the induction, and to subject that minister to deposition, and the probationer to a recall of his license? It is precisely on the same ground with money paid, or obligation undertaken, to the patron,—it is just as much simony under the statutes to purchase a concurrence in the Call, as to purchase the presentation; and you will not overlook, that the Call is here used not for the case where the right of patronage is in the heritors and elders, nor for the case of a call at large, as it is termed, where the presbytery are exercising their right *jure devoluto*; but it is put in the case of a party holding a presentation from a lay patron,—the call referred to in the act being, that concurrence of the people, which, according to the fundamental principle and the established practice of the Church, was required, as well as the presentation, to authorize the collation to the benefice.

Last of all, and even after that series of decisions on which the pursuers have so much relied, you have the General Assembly, in 1782, passing a declaratory act concerning the moderation of Calls, by which, “Upon a motion that the resolution of the Assembly respecting the moderation of calls should, for the satisfaction of all concerned, be converted into a declaratory act, and printed amongst the Acts of Assembly, the General Assembly agreed thereto, without a vote; and, in terms of said resolution, did, and hereby do, declare, that the moderation of a call, in the settlement of ministers, is agreeable to the immemorial and constitutional practice of this Church, and ought to be continued.” And it is remarkable, as appears from the proceedings of that Assembly, printed in an abridgement at the end of the acts for that year, that, upon

this occasion, two motions had been made. The first was, “ that the Assembly declare, that the moderation of a call is agreeable to the immemorial practice of the Church ; but not having sufficient evidence laid before them, that any presbyteries had departed so far from established usage as to lay aside the moderation of a call in the settlement of a minister, dismiss these overtures as at this time unnecessary.” The overtures were from the synods of Perth and Stirling, and Fife, and other synods. The opposite motion was, “ That the Assembly declare that the moderation of a Call in settling a minister, is agreeable to the immemorial and constitutional practice of this Church, and ought to be continued. And on the question being put, the second motion carried; and the General Assembly declare accordingly.”

Your Lordships will then observe, in the first place, that both parties were agreed in holding, that the moderation of a Call was agreeable to the immemorial practice of the Church ; but a majority of the Assembly could not dismiss the overtures as unnecessary, on the ground that there was not sufficient evidence before them, that presbyteries had departed so far from the established usage as to lay aside the moderation of a Call ; but thought it better, waiving that inquiry of fact, to give no sanction to any relaxation which might have occurred in the practice of the Church. While, however, they asserted the principle as agreeable to the immemorial usage and constitution of the Church, they declared it ought to be continued. Last of all, your Lordships will find, that, according to the daily practice of the Church, no minister is settled without a Call. Dr Hill, in his work upon the Practice of the different Judicatories, mentions, among the different steps of induction, the moderation in the Call. And when the presentee comes to be ordained, after all his trials are passed, he is obliged, in the face of the congregation, to answer various questions, and among others, “ Have you used any undue method, either by yourself or others, in procuring this Call ? Do you accept of, and close with, the Call to be pastor of this parish ; and promise, through grace, to perform all the duties of a faithful minister of the Gospel among this people ?” If the presentee were unable to answer the first of these questions put to him in a satisfactory manner,—if any undue methods had been used to procure that Call, which is now represented as of no consequence in a settlement, he must be subjected, under the acts of Assembly 1753, 1759, to the penalties of deposition or deprivation of license ; and, therefore, your Lordships have, in the daily practice of ordination and procedure which it is necessary to observe in the induction of a clergyman to a parish, the most satisfactory and conclusive evidence that the Call is not a mockery,—is not a dead thing, but a living principle, which is yet in observance. It seems

impossible, after these indications, to doubt that the Call is an essential part of the procedure in the settlement of a parish; and that the declaration of the Assembly in the act of 1782 was completely warranted by the written law of the Church.

This part of the case is, however, so important, that, before leaving it, I must be permitted to call your Lordships' attention to the extent to which the principle was operated upon subsequent to 1711, when the right of patronage was restored. The cases previous to that time, at least subsequent to the restoration of presbytery after the Revolution, are of less importance, because they relate to the period when patronage was vested in the elders and heritors, and when the election, therefore, of the minister was in the hands of the people.

It was observed by my learned friend, the Procurator, that the published records of the Church were very meagre and imperfect, in regard to the judicial proceedings; and on this account he referred only to two cases which he observed in the printed acts. I have, since that time, looked more extensively into these acts; and my learned friend, Mr Dunlop, has made some farther inquiries, by such examination of the records themselves as the limited time, and the state of the Church records, which it is at present very difficult to consult, would allow. The result, however, has been, that, from 1712 downwards, there was scarcely a year in which a case, or cases, had not occurred in which the Assembly had been required to adjudicate a question raised as to the sufficiency of a Call. The Call has been considered all along, a step, in itself so important and essential, that questions have been again and again raised whether the Call was adequate; and in not one of these cases, even down to the present day, has it ever been held, even by the party most adverse to the popular interests, that a Call could be dispensed with; or that it was an irrelevant point of consideration, whether the Call was sufficient.

The general progress of the decisions of the Assembly in each particular case has been already fully explained to your Lordships, and will be found very clearly laid down in the statement of Sir Henry Moncreiff. The party who latterly got possession of the Assembly and ruled its judgments, went on, by consecutive decisions, to reduce the amount of the concurrence required. Their influence was greatest in the Assembly; and it was long before the corruption, if it may be so called, was sensibly felt in the synods and presbyteries. In these lower judicatories of the Church, more removed from the influence of a predominant party, the adequacy of the Call was always considered as a serious question; and Calls were again and again rejected by presbyteries and synods, where the Assembly sustained them upon appeal. It was not till

the case became desperate that the inferior judicatories followed the rule of decisions which had been laid down by the Assembly.

In the earlier years after 1712, there does not appear a single case where a patron insisted on his presentee being settled. In many cases there is no mention of the patron at all; in others the patron is stated to have waived his right, or to have concurred with one of the parties, where there was a competing Call. But in all of those cases the decision of the Assembly proceeds on the Call; and the judgment pronounced by the Assembly is uniformly sustaining *the Call*, or dismissing *the Call*, without reference to the presentation. For some time, indeed, the presentees did not found upon their presentations, and it was considered a matter of offence in the Church if they accepted of a presentation, and grounded their right upon it, instead of proceeding upon the Call.

One of the earliest cases in which the patron seems to have insisted on his right, is the case of *Spynie* in 1720. Sir Henry Innes of Innes appealed from a sentence of the Synod of Murray, refusing to settle Mr William Mercer, probationer, as minister of that parish, upon his presentation, and a Call of the heritors and parishioners, the settlement being opposed by others of the heritors and people. The Assembly (May 16th,) remit the matter to the Commission, and, in the meantime, appoint the Presbytery of Elgin to invite Mr Mercer to their bounds, "and employ him to preach in the foresaid parish of Spynie, and take farther trial of the inclinations of the people of that parish towards him." On the 11th August, the presbytery report to the Commission, that they had taken farther trial of the inclinations of the people, and after all it appears, that, of nine heritors, three were for Mr Mercer, and six against him; of thirteen elders, three were for him, and ten against him; and that twelve heads of families were for, and sixty-nine against his settlement at Spynie. Certain adherents of Mr Mercer for themselves, the patron and others, appeared, and alleged, that there were undue methods used in this matter against Mr Mercer, that several of those who opposed his settlement were disaffected to the present establishment of the Church, and that their opposition, consequently, should not be regarded: and they farther stated their hope of being able to accommodate matters before the meeting of the commission in November; and, on that account, the consideration of the case was deferred till November, when it was intimated that the appeal was deserted,—Mr Mercer having been settled at Pit-sligo.

It is very remarkable that, in this case, it never was maintained on the part of the patron, presentee, or those who concurred in his Call, that effect should be given to the presentation notwithstanding the opposition of the majority. On the contrary, the en-

deavour in argument was to take off the effect of the dissent of the majority, by showing that they consisted of persons whose opposition was not to be considered. The question still went on the adequacy of the Call, and a Call by so small a number, and so largely opposed, was not held to be adequate.

In the case of *Lochmaben* in 1723, the matter was referred to the commission. At the first meeting of the commission, appearance was made for the Crown as patron of Lochmaben, and for 125 parishioners, demanding the affirmance of a sentence of the synod of Dumfries, appointing a Call to be moderated in favour of Mr William Carlisle, the Crown presentee, alone; and, on the other hand, appearance was made for Lord Avondale in favour of Alexander Shank; and for Lord Stormont in favour of another presentee; but neither of them pretending any right to the patronage. The question was put, whether the commission should appoint the presbytery of Lochmaben to proceed to moderate in a Call to Mr Carlisle alone, or not, and it carried Not; and, accordingly, the commission remitted to the presbytery to proceed without delay, according to the rules of the Church, and to report to the commission in August.

At the meeting of the commission, the presbytery reported that they had invited another probationer, Mr Edward Bunkle, to preach in the parish; and they afterwards "appointed a Call to be moderated indefinitely, that the people might have a free choice." On the 22d of August the commission approved of those proceedings, and instructed the presbytery to report what had occurred in moderating that Call, without themselves passing any judgment upon it. A Call was accordingly moderated in; but the presbytery, instead of obeying the commission, sustained the Call to Mr Bunkle, and settled him as minister, going through the trials in five or six days, and rejecting the competing Call in favour of Mr Carlisle, the Crown presentee.

The commission, in November of that year, rescinded the settlement of Mr Bunkle, in respect of the presbytery's disobedience; and, by a subsequent act, they sustained the Call to Mr Carlisle, and appointed him to be transported from another parish of which he was then minister.

Mr Carlisle was accordingly transferred; but, on the matter being brought before the next General Assembly of 1724, the Assembly found that the commission, in judging of any of the proceedings in the settlement, after their first sentence in May, had exceeded their powers, and acted beyond the remit: and then the Assembly took up the case on its merits, and the following procedure appears to have taken place. It was proposed, "That for quieting the parish, and more comfortable settling it, both Calls and whole proceedings upon them might be laid aside, and a

" new Call might be moderated, that so the true choice of the people might be undoubtedly known; and some others observing, that this could not remove the difficulty arising from His Majesty's presentation to Mr Carlisle, *supported with the Call of the people*, it was then moved, that His Majesty's Advocate might be heard as to that point, since probably he might propose something that might tend to remove that difficulty. After which His Majesty's Advocate signified, that, although he humbly thought that Mr Carlisle was clearly entitled to be minister, in virtue of His Majesty's presentation, *concurring with a popular Call, and the undoubted choice of the far greater majority of the parish*, yet, if the Assembly thought fit further to try the inclinations of the people, and for that purpose to appoint a Call to be moderated of new, though he could not take upon him without an express warrant to pass from His Majesty's presentation, yet, in order to quiet the parish, and put an end to the heats that this matter had made, he presumed, from His Majesty's wonted goodness and concern for the peace of the Church, that he might obtain His Majesty's express leave and warrant not to insist on the presentation, in opposition to what should be found the choice of the parish." The Assembly accordingly set aside both Calls by their deliverance, which is printed in the Index to the Acts of Assembly 1724.

In the case of *Aberdeen* in 1725-6, the magistrates having given a call to Mr James Chalmers, minister of Dyke, which the synod sustained, the Assembly on appeal reversed their sentence, and appointed a new Call, declaring, that, in the moderation, the Magistrates and Town-Council of Aberdeen should vote in conjunction with the elders, and that the inclination of the heads of families that attended the ordinances dispensed by the ministers of the Established Church should be consulted. Thereafter a majority of the magistrates and elders called Mr James Chalmers; but of the heads of families, while 139 voted for him, 317 gave their voices against him. The commission, to whom the matter had been referred, sustained the call at their meeting in August; but, against this decision, certain members of the commission dissented, resting their dissent on the inclinations of the people not having been sufficiently attended to. The reasons of dissent were lodged by Duncan Forbes, then Lord Advocate, and in answer, the respondents founded chiefly on the allegation, that since the Revolution, the callers in royal burghs had been the magistrates and elders; and that the General Assembly could not mean to declare that the members of the congregation should have equal weight with those others.

In consequence of this decision of the commission, Mr Chalmers was inducted, and when the matter was brought before the General Assembly, the following procedure took place: "The ques-

“tion was put, Approve of the commission’s proceedings with regard to the settlement of Mr James Chalmers as one of the ministers of Aberdeen, or not? And it carried by plurality of voices, Not. And therefore the General Assembly did, and hereby do, *disapprove* of the Commission’s proceedings in that matter, and that because they acted disagreeably to the injunctions of the last Assembly, *particularly in not making due inquiry, and not having due regard to the inclinations of the people*, and because of their too great precipitancy in proceeding to a sentence when the time fixed for the meeting of this Assembly was so near. Parties being called in, and the premises intimated to them, the Assembly proceeded next to consider the effect of the Commission’s sentence, settling Mr Chalmers at Aberdeen, and whether the said sentence shall stand, and the settlement subsist, or the foresaid sentence shall be reversed, and the settlement annulled; and all parties concerned being fully heard upon this question were removed, and after much reasoning upon the head, *particularly as to the Commission’s powers, and the practice of the Assembly with relation to their sentences complained of*, as also the whole circumstances of the above-mentioned settlement, the vote was stated, rescind the settlement of the said Mr James Chalmers as one of the ministers of Aberdeen, or not, and the roll being called, and votes marked, it carried by a plurality of voices in the negative, and therefore the General Assembly did, and hereby do, refuse to loose that settlement.”

In this decision the General Assembly, no doubt, refused to annul the induction of Mr Chalmers, who had been already settled in consequence of the decision of the commission; but, although they refused to alter the settlement, they passed a very remarkable resolution, in which they declare, that the commission had acted contrary to the instructions of the Assembly, and particularly in not making due inquiry, and adequately consulting the inclinations of the people.

In the case of *Old Machar*, in 1729, two calls were given by different parties, one to Principal Chalmers, of King’s College, who had a presentation from the College, as patron, as appears, not from the proceedings in the Court, but from the publications of the day; and another to Mr James Howie. The relative number of subscribers is not stated; but the Presbytery sustained the call in favour of Mr Howie. The synod reversed that decision, and sustained the call in favour of the Principal, and inducted him into the parish. Against all this an appeal was taken by the callers of Mr Howie, and a petition was at the same time presented to the Assembly by a number of heritors and heads of families, who set forth, that they had no “clearness” to sub-

scribe either of the Calls, and prayed that moderation in a new Call should be appointed. The Assembly of 1729 in this case rescinded the settlement, declared the parish vacant, and appointed a new Call.

It is unnecessary to refer to the proceedings under the new Call in 1730, which terminated in the settlement of the Principal; but it is remarkable that, in this case, although it appears from the pamphlets of the day in which the case was very warmly discussed, that the Principal had on both occasions the presentation from the College, he founded on that presentation in neither case, but rested entirely on the sufficiency of the Call.

The case of *Hutton* in 1730, appears to have been the first instance in which the Assembly forced a settlement against the will of the people, by affirming a sentence of the commission sustaining the Call, notwithstanding of such dissent as in many previous cases had been held to destroy its effect. It is important to remark, however, that this judgment was not pronounced by the Assembly on consideration of the actual merits of the cause; but after the Assembly of 1729 had excepted that matter from their general approval of the commission's proceedings, and left it over to the Assembly of 1730, the deliverance then given was in these terms:—"The General Assembly did and hereby do refuse to reverse the foresaid sentence, *in respect the commission had been empowered to determine finally in that affair.*" In that and subsequent years, the Assembly found it very difficult to enforce obedience to their sentences. The presbyteries, viewing with the greatest dissatisfaction the judgments of the Assembly supporting Calls against the opposition of a majority of the congregation, the expedient was resorted to, of appointing riding committees, as they were termed, to execute the sentences of the Assembly, and of the commission; but although in these cases the Assembly went far in sustaining Calls upon what had been previously considered slight and inadequate support, the question always occurred as to the sufficiency of the Call, and was settled by the decision of the Assembly holding the Call to be sufficient.

I have mentioned these cases in more detail, because they occur at an early period, and that I have been enabled to state them from report made to me after examination of the records. But, in order to satisfy your Lordships of the numerous cases in which the question has arisen, through the whole of the eighteenth century, upon the sufficiency of a Call, it is only necessary to open, almost in any year, the Acts of the Assembly, where its judicial proceedings are abridged, and in all the cases which I am now to notice there were presentations by a patron. I do not advert to cases of Calls at large, where there was no presentee, or the presbytery were exercising their *jus devolutum*.

And to begin with 1740, your Lordships have in that year the ce-

lebrated case of *Currie*, in which an appeal was brought to the Assembly from a sentence of the Synod of Lothian and Tweeddale, setting aside a Call by four heritors and three heads of families, of the parish of Currie, to Mr James Mercer, minister of Aberdalgy, who held a presentation from the Magistrates and Council of Edinburgh, patrons of Currie. The Assembly, in the first instance, held that there was sufficient evidence that the city of Edinburgh had the patronage, and appointed a committee to confer with all parties touching the comfortable settlement of the parish. It is unnecessary to remind your Lordships, after what has been stated in this discussion, that Mr Mercer, in consequence of the part he had taken in the proceedings relative to the secession and deposition of Ebenezer Erskine, was a person not merely unacceptable, but very offensive to the people in many parts of Scotland; and although he had got a certain concurrence to his Call, his settlement in the parish of Currie was very vehemently opposed; and a committee appointed, reported to the Assembly, “that, in respect of the difficulties attending the Call to Mr Mercer, they cannot proceed to settle him in that parish while those difficulties remain;” and, therefore, that, if the magistrates of Edinburgh, as patrons, should offer a leet of six, to be tendered by the presbytery to the heritors and elders, the presbytery should be directed to appoint a day for the moderation of a Call by the heritors and elders of one of the said leet; and that the presbytery should support which of the leet was chosen by the majority of the heritors and elders; and that the magistrates and council should be recommended to present the person so chosen; but that in case no choice should be provided by the presbytery, and in case the magistrates and council should present any body they thought fit, the presbytery should proceed to the settlement of such person, agreeably to the rules of the Church.

It is needless to prosecute farther the settlement of Currie. Your Lordships see, that, in this case in 1740, the Church would not proceed to the settlement of a party holding a presentation from an undoubted patron, although the Call had been concurred in by a certain number of the heritors and heads of families, because of his general unpopularity,—because of his unacceptableness to the parish.

The year 1741 furnishes another case from the parish of *Cairnbee*, in which the Assembly refer to the Commission to determine on an appeal of Lord Kelly as patron,—the other parties being the heritors and elders of Cairnbee,—from a judgment of the Synod of Fife, setting aside the Call and presentation to Mr Nairn, probationer, as minister.

In 1742, I find a sentence of the Synod of Lothian and Tweeddale affirming a judgment of the Presbytery of Peebles, “declaring, that, in the present circumstances of the parish of
“Maner, they could not proceed to the settlement of Mr Andrew
“Plummer, probationer, as minister of that parish; and recom-

“mending to the said presbytery to deal in the most prudent manner with all concerned, in order to bring about the comfortable settlement of the said parish,” affirmed unanimously by the Assembly; and the moderator ordered to write letters to the Earl of March, patron of that parish, and to his curators, “to give them notice of this sentence, and entreating they would not insist on their presentation in this case.”

No doubt in this case, the Assembly, as in the case of Currie, and in other cases, appointed a communication to be made to the patron, whose concurrence in these proceedings it was in many respects desirable to obtain; but although they communicated to the patron the decision to which they had come, and the grounds on which it rested, they still in this case refused to proceed to the settlement, in respect of the unacceptableness of the probationer to the parish.

Similar questions as to the validity of a settlement were raised in 1743, in regard to the parish of *Kincardine O'Neil*, where the Assembly finally sustained a Call in favour of Mr Michie, who held a presentation from Gordon of Cluny, the patron.

In 1744, the Assembly having heard a petition of John Vans of Barnbarroch as patron, and other heritors, and others of the parish of *Kirkowen*, callers of Mr John Hart, probationer, to be minister of that parish, tabling certain appeals from the Synod of Galloway, in so far only as it affirms the sentence of the Presbytery of Wigtown, sustaining the call of the heritors, elders, and others of the parish of *Kirkowen*, to the Rev. Mr Robert Hunter to be their minister; and the Assembly appointed the said presbytery to proceed to his trials and settlement, as minister of *Kirkowen*, according to the rules of the Church.”

A similar question arose in the settlement of *Kilpatrick-Fleming* in 1746, and in that of *Govan* in 1747.

In 1752, there was a similar cause relative to the parish of *Cromarty*, touching the sufficiency of the Call in favour of Patrick Henderson, who held a presentation from Urquhart of Meldrum, the patron.

In 1760, an objection was taken to the call of Dr John Chalmers, the presentee of Lord Ruthven, patron of the parish of *Kilconquhar*, but the objections to the call were repelled.

In 1768, a similar case arose as to the parish of *Comrie*, and whether Mr Lindsay, the presentee of Lord Glencairn, the patron, had received a sufficient Call to support the presentation.

Opening almost at random the Acts of Assembly, a similar question will be found in 1778, in the case of Mr John Oswald, presentee of Sir Lawrence Dundas, patron of the parish of *Clackmannan*; and in 1780, in the case of the parish of *Biggar*, a Mr Pearson, a probationer, the presentee of Lady Elphinstone, and patron of that parish.

In 1781, a similar case arose from the parish of *Carsphairn*, upon an appeal from John Newall, Esq. the patron, and Mr Robert Affleck, his presentee.

In 1782, the Assembly decided upon an objection to the Call given to Mr Gillespie, presentee of Sir James Colquhoun, to the parish of *Arrochar*.

In 1784, a similar question arose from the parish of *Catheart*, in which the Assembly, reversing the sentence of presbytery, sustained a Call in favour of Mr Buchan, the presentee of the patron of that parish; and in 1785, a similar course was followed in the case of the parish of *Langholm*, upon a petition from Mr Laurie, the presentee, and his Grace of Buccleuch, the patron.

It were unnecessary to occupy your Lordships' time by enumerating more cases of the same description. It was a mistake to suppose that they were to be found only here and there. The Acts of the Assembly, and the abridgement of its proceedings, show them to have occurred almost every year. It is perfectly true, as has been again and again remarked, that about the middle, and still more towards the end, of the eighteenth century, the decisions pronounced by the Assembly in the cases repeatedly brought before them required less and less concurrence; that they sustained the Calls with a smaller and smaller subscription, till at last, in one case, a call was sustained where the instrument termed the Call had not been signed at all, a single heritor concurring by letter. But, during the whole of that century, no settlement was made without a Call. It never was considered as irrelevant to state an objection to a Call; but the case was always dealt with upon its merits; and while the objection was dismissed, the Call was sustained, and the induction proceeded with, in consequence of the Call being sustained, as a necessary part of the procedure. The presbyteries, and for some time also the synods, retained the stricter and purer notions of the Church, in regard to the extent of concurrence necessary to make an adequate Call; and, accordingly, the common course which these cases took was, that the presbytery refused to sustain the Call, and the synod generally referred their sentence to the Assembly, occasionally, however, reversing or affirming; and the Assembly latterly, and almost uniformly, reversed the sentence of the presbyteries, and sustained the Call. Some exceptions, however, there are in which the Assembly did refuse to sustain the Call as adequate.

Even after this course of decisions, and within the last thirty years, as must be known to many of your Lordships who practised in the Assembly, it never was alleged at the Bar, nor would any churchman have listened with patience to the argument in the face of the resolution of the Assembly of 1782, that a call was no part of the immemorial and constitutional practice of the Church; and

that it was therefore unnecessary to inquire into the objections to a Call, because a Call was in itself immaterial. The argument, on the contrary, always assumed that a Call was a necessary part of the proceedings, and took the case as one in which the only question was the validity of the Call, its adequacy, its sufficiency ; and very few of those cases were determined, if any, in which there was not a considerable minority in the Assembly dissenting from the judgment by which the Call was approved.

There is only one other case, that of *Arbroath*, in 1790, with which I shall trouble your Lordships in concluding this tedious citation of authorities ; but it is peculiar. The Presbytery of Arbroath had been required to appear at the bar of the Assembly, to account for their proceedings in the settlement of Mr George Gleig, as minister, and the minutes of Assembly bear, that the record of the presbytery respecting the said settlement was then called for and read : “ And the presbytery, being heard in their own defence, “ were removed.—After reasoning, the Assembly unanimously “ found, that the proceedings of the presbytery of Aberbrothock “ in the settlement and ordination of Mr George Gleig, were highly “ irregular and incompetent, in respect that they proceeded to take “ the steps towards the said settlement without having any Call “ before them, and while their minutes bear that there was no “ Call : That they afterwards proceeded to the settlement of Mr “ Gleig in the face of an appeal regularly taken in the cause against “ a sentence of the Synod of Angus and Mearns to the last General Assembly ; and that it does not appear from their record “ that, at the time of the first ordination, they required Mr Gleig, “ to subscribe the Confession of Faith and Formula, as the laws “ and practice of this Church require.” And, therefore, the Assembly found, “ That, in these respects, the conduct of the presbytery was unjustifiable, and deserves the censure of the Assembly.” The Assembly, therefore, did admonish and enjoin the presbytery of Aberbrothock to be careful to guard against such irregularities for the future, and appointed the clerk of Assembly to transmit to the clerk of the presbytery of Aberbrothock, an extract of this minute, which they ordained to be entered into the record of the said presbytery at their first meeting.

Although the Assembly in this case, as in some others, thought fit not to annul the settlement which had been made by the presbytery, or to disturb the spiritual relation then actually constituted, they did, as your Lordships see, unanimously censure the presbytery for having proceeded to the settlement without a Call, as having acted in that respect directly at variance with the established law of the Church, as declared in the resolutions of 1782.

The result is, not only from the statute books of the Church, from immemorial usage, and legislative enactment, but also from the decisions of her courts pronounced in questions brought ju-

dicially before them, that the Call has been invariably conceded as the first step to ordination, and is essential to the procedure which terminates in constituting the pastoral relation to the parish. It is of such importance, that the Assembly, in its judicial capacity, has refused to proceed without a Call; while in its legislative capacity, it has declared it to be necessary to the completion of the induction into the pastoral charge.

It is idle, therefore, to refer to any decisions in particular cases, constituting even a series *rerum judicatarum*, as a proof that the Call is a mockery, or a thing ineffectual, when we find the Church in every possible way and manner, acting judicially and legislatively, declaring the Call to be essential to induction. But if the Call be essential to induction, there can be no doubt that it is within the power of the Church to regulate legislatively the matter of the Call, as well as to decide judicially on each question as it separately arises. Your Lordships cannot review what has been done by the Church in her legislative capacity, and cannot hesitate for a moment to concede the power of regulating by legislative enactment what belongs exclusively and properly to ordination. If her ordinary courts, in their judicial decisions, have gone out of the right path, and by a train of precedents established what is inconsistent with the fundamental laws of the Church, and contrary to her ecclesiastical interests, there cannot be a doubt of her right to interfere legislatively, in order to correct the errors or misdeeds of her judges. Another course, no doubt, might have been adopted, and her Assemblies still deciding upon each particular case as it occurred, might have fallen back upon the true principle, and disregarded the rule of decision which had been given by a series of precedents inconsistent with her law. A judicial remedy found in this way is not altogether unknown in the civil courts; nor would it require much research or deep reading in the decisions of the Court of Session to discover instances in which, after a series of cases had been decided in one direction, the Court came to be satisfied, that their predecessors had gone wrong, and corrected themselves, not of course by any legislative act—for that was beyond their province—but by recurring in their judgments, as new cases arose, to the right principles of the law, or to their juster and more correct application.

The Church might have followed a similar course, acting through the Assembly as a judicial body, if she had no other means of remedy. But I think it difficult to maintain, that—invested, as she unquestionably is, with legislative power, and seeing that her Assemblies, acting judicially, have gone so much off the course as to reduce the Call to a mere mockery,—she did not adopt the better part, when she corrected this judicial error by a declaratory law, announcing and recognising the true principle of her constitution; and passed enactments, grounded upon that declaratory law,

to be the guide and rule of her courts in the adjudication of the cases that might afterwards arise. The act of Assembly of 1834, and the law which the Church has since enacted in conformity with the act, regulates the Call, which is a part of the ecclesiastical process of ordination; and whatever may be its incidental effects—of which I shall speak immediately,—it was intended simply as a rule by which the judicatories of the Church should decide on the ecclesiastical matter of the Call. It is said, no doubt, and this is the mode pursued on the opposite side as the basis of their argument,—that regard must be had to the right of the patrons; but if the Church, under reservation of the civil rights of patrons, has been recognised by the State as possessing the whole right of collation and induction; and if the Call be essential to collation and induction,—how can it be said that the right of the patron is a civil right independent of the Church, or of the right of the Church to regulate and determine every thing essential to ordination? The question may be brought to a very simple test. Could it be maintained for a single moment, in the face of all the authority which has been laid before your Lordships now, and by my learned friend who spoke first in this debate, that any presentee could be ordained without a Call,—that the Call might be entirely superseded, and the presentee inducted into the parish without that form, neglecting and passing over that part of the procedure which has been recognised as essential from the earliest period of her history? Such a position appears to me untenable. It is contrary to the first principles of her institutional writers;—it is contrary to the forms and proceedings laid down in all her elementary books, and daily observed in practice;—it is contrary to the standards of the Church, and discipline of the Church, and to her most solemn declarations and enactments. I refer, not only to the act 1782, but to those other enactments of 1756 and 1759, in which she herself expressly declared, that it shall be simony, inferring deposition of office in the case of a minister,—deprivation of license in the case of a probationer,—if any undue practice shall be resorted to in order to procure concurrence to a Call.

If the right of the presentee cannot be perfected without a Call, is it not plain, that the right of patronage is not an absolute and unconditional right? But although a civil right in many respects, it has all along been subject in its exercise to those rules which the Church in its proper sphere and province imposes upon the procedure necessary to ordination. That it is not an absolute right is sufficiently plain. It is a right not held for the benefit of the patron, but is in all respects, and absolutely, a trust, and of such a nature, that, by the exercise of the right, he can draw no patrimonial advantage. But the great consideration here is, that it is a right which can only be exercised to effect, with the concurrence of the Church. In many respects this will at once be conceded.

The Church, for instance, is the sole judge of the qualifications of the presentee in doctrine and in morals ; there is no appeal to any civil court from her decisions in that matter ; and the patron as well as the presentee is bound by her judgment. She is in like manner mistress of every thing that belongs to the process of ordination and induction. The Call is an essential part of that process ; and, unless the requirements of the Church in regard to the matter of the Call be satisfied, the presentee cannot be inducted ; and the gift of the patron will prove ineffectual, not because the Church has done any thing inconsistent with the civil right of the patron, but because the civil right of the patron is in its effectual exercise so far dependent upon the Church,—and dependent on the Church in virtue of the law of the statute,—that no presentee can be inducted into a parish, and therefore become entitled to the temporalities of the benefice, unless the Church shall be satisfied of his right to bear the spiritual character of pastor, and shall confer that character upon him.

The question, therefore, will be found to lie in a much narrower compass than I think has been supposed in a great deal of the argument hitherto addressed to the Court, particularly by my learned friend the Dean of Faculty. If he has maintained, that the civil right of patronage is actually independent of the Church, he has failed, and must fail, to make good his position. If he admits, as he must admit, that, to a certain extent, it is dependent on the Church, the only remaining questions are, whether the Call be a matter essential to the induction of a clergyman, and consequently to the completion of the presentee's right ? and, whether the Call be a matter ecclesiastical, and which the Church is entitled to regulate ? It humbly appears to me, that no one can review the history of the Church,—her statutes,—her course of decisions,—and attend to her immemorial use and practice, and deny that the Call is an essential part of the process of induction ; and which it is peculiarly in the province of the Church to regulate.

It is in vain that my learned friends have attempted to make an argument upon the expediency of the Act of Assembly 1834, which passed into a law in terms of the barrier act. This is not the place in which to discuss the propriety of that measure. In some views possibly a question may be raised whether it was *intra vires* of the Church ; but if it was within the legislative power conferred upon her by the state, there are no grounds upon which any question of expediency can be here raised. It appears to me to have been a very extravagant course of argument, which has led my learned friends on the other side into a general discussion of the veto act in all its points. They say that its intentional purpose is to accelerate the *jus devolutum* ; to oust the right of the patron in favour of the Presbytery ; and to provide a diffe-

rent rule for the presbyteries in the exercise of the patronage so devolved on them, from that which the Church requires in the case of a lay patron. We are not here in a declaratory suit to try the validity of the Act of Assembly 1834 in all its points. The only question which can come before this Court under this action, is the propriety of the course which the Presbytery of Auchterarder followed in regard to the settlement of Mr Young. If the act of 1834 were ever so much beyond the powers of the Church, and her proper province judicial or legislative, in other respects, provided it be within it, in so far as the Presbytery of Auchterarder adopted it as the guide of its decision in moderating in the Call to Mr Young, it is perfectly plain, that, for all the purposes of this action, any objections to the Act of Assembly are irrelevant and unworthy of consideration. But putting all this aside, and supposing that this question did involve the validity of the Act of Assembly, I maintain that it is an Act of Assembly to regulate the Call; and, therefore, an act within the power of the Church, because the Call is a matter purely ecclesiastical. And, appearing before you in defence of the Presbytery of Auchterarder, I will not consent to speak upon the expediency of the measure, because I do not acknowledge any power in this Court which entitles them to question the propriety of any act done by the Church, legislatively, within her proper province. No doubt one is tempted to the discussion by the observations thrown out on the other side of the Bar, and by the attempt they have made, idle and irrelevant as it certainly is, to show that the measure of which they complain was unjust, and such as a church, consistently with her true interests, ought not to have adopted; but I will not yield to the temptation, nor enter into that field of discussion. I consider it entirely out of this question, not of this place; and I should feel that I betrayed my duty to the Church, if I stopped for a single moment in the course of this argument, to vindicate the propriety of her legislative acts. This only I may be permitted to observe in passing, that, if it were either incumbent or becoming in me, to explain here the grounds of expediency which weighed with the promoters of that measure, and with the majority of the Assembly by whom it was carried, it were not difficult to state to the Court many considerations having regard to the situation of the Church, to the views of the different parties which are ranged within her pale, and to the danger to which she is exposed from without, which would make all the objections that you have heard stated to this measure in the course of this debate, appear frivolous and shallow. But I refuse the discussion entirely. I will not take up the challenge. I do not admit that this is an arena in which it is necessary for the Church to defend any act which she can show, as I think this plainly can be shown, to be an act within her power.

A great deal has been said about the origine of the Call ; and we have been required to point out the particular statute by which it was sanctioned. If this be a question which we are bound to answer, I confess I am not able from my own information to give a precise answer to it ; but I do not think that I am called on to do so, or that the success of the argument of the defenders depends on the power of answering this question directly, and in terms. The Church, it has been seen, though dependent on the State, and the creature of the State,—was not the creature of any particular statute. There are fundamental principles in her constitution, just as in the constitution of the State itself, which are not referable to any written law ; and the first indications, or explicit recognition of which are not distinctly ascertained ; but which nevertheless exist, and have been practised and enforced for so long a period of time, and have left traces and vestiges so deep, that their existence cannot be doubted. The Call, which is a part of ordination, and consequently a condition of the patron's right, stands in this situation ; and looking to the fundamental principles of the Church, as laid down in the Second Book of Discipline, and repeatedly acknowledged, and to the practice of the Church down to this hour, combined with her laws against simony, and to the recognition of 1782, it would appear just as reasonable to doubt the power of the Church in giving ordination, as to deny that the Call is an essential step in the process.

If the acceptableness of the presentee to the parish be a part of the qualification, and if the Call has its origin as a means of ascertaining whether the presentee possesses those qualifications or not, there is an end of the present question as against the pursuer ; because it must be on all hands admitted,—it does not appear at least to be seriously disputed,—that, under the acts 1567 and 1592, and subsequent practice, the Church has the sole and exclusive jurisdiction in every thing which touches what is properly matter of qualification. The acceptableness, therefore, of the presentee, as matter of qualification, belongs exclusively to the Church to judge of in her judicial capacity, and to regulate in her legislative capacity. Her power to fix, from time to time, the tests requisite to ascertain the qualifications of the presentee, in doctrine for example, or in learning, has never been denied ; and her statute-books are full of enactments on this subject. If acceptableness, then, be a matter of qualification, she must have the exclusive right of fixing the criterion of that acceptableness ; and when she requires a Call, or a certain concurrence of parishioners in the Call, she only points out that evidence upon which she authorizes her courts to proceed. It is no delegation of authority. To call it so is not only a great abuse of terms, but a plain misapprehension of the thing. In evidence of acceptableness, she

requires a certain concurrence. It is for her to say what concurrence shall be sufficient; and precisely as the Assembly, at one time, neglecting the just principles of decision in the matter, thought themselves entitled to hold the concurrence of two or three persons to be sufficient, the Church, in her discretion, and acting in that wisdom which the State has presumed would guide her deliberations, when such powers were conferred on her,—may state the extent of the concurrence that is requisite to constitute a Call. I would only observe in passing here, that the act has been most improperly termed a *veto* Act. No doubt, the result under the regulation of the existing law is, that a majority of male heads of families dissenting will prevent the settlement, and be considered as conclusive proof that there was not a sufficient Call; but in giving this force to a dissent, it cannot escape observation that the Church presumes all parties, who do not appear to vote, to be actual concurrents; and therefore the case comes apparently to this, and it is the most favourable mode of putting the question for the patron and for the presentee, that the Church requires a concurrence of the majority of male heads of families; but that the majority shall be always held to concur unless there be a direct and express dissent. To call the act of 1834 a Veto Act is to give it a nickname. The act assumes a concurrence unless there be an actual dissent. It gives to the patron and presentee the benefit of all the parties not appearing to express dissatisfaction; and takes no evidence of want of concurrence short of express dissent, under the hand of the party dissenting. The existence of such dissent is the evidence which the Church requires. She does not delegate her authority to the people; but she takes the test of acceptableness, holding acceptableness to be a part of the qualification in the presentee, and holding all the heads of families to concur who do not expressly dissent. Now if acceptableness be a matter of qualification,—if it be on the same footing with the sufficiency of the presentee's acquirements in doctrine, in scholarship, in power of preaching, or in various other matters, it seems difficult to see, how the Church, being the exclusive judge in all matters of qualification, should not be entitled to fix such a criterion in regard to the particular qualification of acceptableness; and therefore if acceptableness be one part of the fitness of the presentee for the cure,—and that fitness is not an abstract quality, but is to be taken with reference to the particular parish, to its special necessities, and to the personal qualifications of the candidate,—the acts 1567 and 1592 are conclusive, because as to all questions of evidence in regard to all matters of qualification, they leave the Church the only judge.

If, taking the other view, the Call has its origin, not in the acceptableness of the presentee being a qualification, but in the

principle, that no minister should be intruded into a parish against the will of the people, still it remains a matter ecclesiastical, and for the regulation of the Church. This last principle, indeed, though it may remove the case somewhat from the particular terms of the statutes 1567 and 1592, leaves the Call even more exclusively a matter for the regulation of the Church; for we have seen that it is a part of its constitution from the earliest period of the Reformation downwards,—recognised in the Second Book of Discipline, which was adopted by the General Assembly in 1578, and sanctioned on many subsequent occasions,—that no pastor should be intruded into a parish without the will of the people. If the Call was introduced in order to give this principle effect, as the test, in short, of that concurrence on the part of the people, without which the Church did not allow the pastoral relation to be constituted, then it is plainly a part of the procedure in ordination, which belongs exclusively to the Church, and which, judicially and legislatively, she has the sole right to regulate. In either way, therefore,—and whatever may be considered as the origin of the Call,—it is plainly a part of the spiritual and ecclesiastical process with which it is not for the Civil Courts, but for the Church Courts only, to interfere. It is said, however, on the opposite side, If the Church may do in this matter as she pleases, Shall the parties injured by her acts judicially or legislatively have no redress? My answer is, None *in this court* against her judgment, or against her enactments, in reference to matters purely ecclesiastical: And I maintain farther, that in matters purely ecclesiastical, even if she acts unjustly, illegally, *ultra vires*, still the remedy does not lie with this Court; nor can your Lordships give redress by controlling the exercise of her ecclesiastical functions when in the course of completing the pastoral relation. The Court may have the power of disallowing the after consequences. Your Lordships may refuse to regard the irregular or unlawful proceedings of the Church. When the question before you on any civil right is said to arise out of the relation so illegally constituted, you may refuse, and you have refused the stipend in many cases to the incumbent spiritually inducted; but that is not the question here. The question is, Whether an abuse by the Church of her legislative powers will justify the interposition of this Court? It has been maintained on the other side that *it will* in all cases. I maintain the reverse of the proposition, and that, however competent it may be for the State, by the power of the Legislature, to withdraw their recognition of a jurisdiction which is no longer exercised so as to warrant the continuance of the confidence originally reposed, it is not within your province.

Here it is maintained, that the act 1592 contains a special clause by which the Church is astricted, and obliged to receive and admit qualified ministers, and that the present action has been brought

in terms to enforce this obligation. It is very questionable—and I have heard no answer to my learned friend, the Procurator, on the point—whether that clause of the act 1592 be still in force; and, having been distinctly repealed by previous statutes, can be held to be constructively revived by the operation of the act of 1712. For the purpose of the present argument, however, I think this is a matter of very little moment. The statute of 1712, although using different language, expresses the obligation upon the Church in terms sufficiently explicit; and I am willing to take it as the case, that the act 1592 remains in full observance, and that the Legislature still emphatically declares that the presbytery should be bound and astricted to receive a qualified minister. In making this concession, I yield, perhaps, another point. The statute 1592, in referring to a qualified minister, like that of 1612, which authorizes expressly legal process against a bishop, probably meant by a “qualified minister” an ecclesiastic already ordained, not merely a person claiming to be admitted to orders; whereas in the Church of Scotland, as your Lordships are well aware, the ordinary case of the presentee, unless in the case of translation, is that induction and ordination go together, because the Church does not confer upon the clergy the *ministerium vagum*, or grant full ordination, except where there is a cure of souls. But, passing all this by, and considering the act of 1592 as still in force, does it follow that your Lordships have power to see to the observance of that obligation by the Church? or, in the event of her failing to discharge her duties, that *you* can compel her to do so? The Church has not in this respect only, but in many others, rights and powers of very large extent, and of vast importance to the temporal and spiritual welfare of the people. In this as in all other cases, right and power imply corresponding duties and obligations. For the exercise of her rights and powers, for the performance of her relative duties and obligations, the Church, unquestionably, is responsible to the State, by which as an establishment she is created; but she is not therefore responsible to *this Court*, unless, indeed, it can be shown that the State has made this Court the Supreme Judge over the Church, and has conferred on it power to correct an abuse of power which the Church may commit in the discharge of what are purely her ecclesiastical functions.

This brings me to consider, what is of very great importance in this case as a criterion by which to ascertain how far this Court has power to interpose, in the manner which is asked by this action, namely, What sort of remedy is proposed upon the other side? There is no remedy asked in the Summons. The Summons concludes for a mere declaration of right; but my learned friend supplied this defect, and has been pleased to explain pretty fully the sort of remedies which he expects; and I am glad

that he has done so, because it brings the matter to this test, Whether any enforcement which your Lordships' decrees in this Court can receive, will reach the case which is in Court.

It has pleased the other side to suppose, that, in saying there is no redress against the presbytery, and that they are beyond the reach of your care, we have considered the presbytery merely as an *ens rationis*, as a creature embodied only in the functions of the law, but having no actual existence,—untangible—impalpable—impassive—not confinable; and then they say, that in that view, to be sure, there can be no remedy. The pursuers have the entire merit of this very ingenious device; for it never occurred to the defenders; and when they denied the existence of any remedy against the presbytery, they talked of the presbytery, not in the abstract, but of the presbytery in the body,—consisting of individual members, clothed with flesh and blood, subject, like all the other lieges, to pains and penalties, if these could be justly inflicted. But taking the case in the plain view,—rejecting the protection which is imagined, in the mere abstraction,—I still ask your Lordships, What remedy can be imagined, if the presbytery should refuse to fulfil that obligation, which your Lordships' judgment should declare to be incumbent on them? Can you by any decree order the presbytery to take a candidate upon trials, and, if found qualified, to establish the pastoral relation by ordination? Can you complete his admission to the spiritual cure, as you may, no doubt, declare his right to the temporal fruits of the benefice? Where is there authority for any such proceeding in the act 1592? That statute is directly to the contrary; for it points out a specific remedy in the event of the presbytery refusing to induct, namely, That the patron shall have right to the stipend. That is the alternative which the statute allows; that is the peculiar civil remedy which is given for the civil wrong; and the very circumstance of that special remedy being given, proves, in the strongest manner, that no other remedy was intended; and that any thing like civil process, under your Lordships' decrees, to establish the pastoral relation, is a proposition utterly preposterous and extravagant.

What means have your Lordships of forming a judgment as to whether, in a particular case, the party proposed is a fit pastor for the parish, whether it is or is not consistent with the interests of the Church, that that particular part of the flock should be placed under his spiritual care? Looking to this Court,—to the principle on which it is called to act, to the knowledge which the constitution presumes, and rightly presumes, to reside in it, you have not the means of forming a correct or proper judgment upon those spiritual matters, which the constitution has confided to no civil court, but given for regulation to the Church in her judicial tri-

bunals, and in her own internal legislature. Enforcing by 'your Lordships' decree the spiritual induction of a pastor ! Compelling, under pain of horning and imprisonment, the Church to confer the spiritual gift of the ministry ! Have the pursuers reflected for a moment even upon the nature of the proposition they maintain. It is simony—a grave ecclesiastical offence, a crime even of deep die in the eye of the Church, and not considered lightly by the law—to procure presentation for good office and reward, or in the case of a call, to procure concurrence to a call by similar means ; then what shall it be if the civil power compel by imprisonment, by the dread of punishment—by brute force, for it comes to that—the imposition of hands, and that gift of the spirit which is presumed to pass by the ceremony of ordination ? The supposition is monstrous, and it is the more extraordinary, when one considers the constitution of the Church of Scotland in this respect, that she has not, as other churches often have, their ready-made clerks, their clergymen already completely ordained, stamped by the Church—persons to whose ministry there can be nowhere any objection ; but that every case of presentation, with a few exceptions, as already observed, of ministers transferred, implies a case of ordination. So that if it is held that a presbytery may be compelled, by your Lordships' decree, to admit the presentee to the benefice, they must equally, and by necessary inference, be held as compellable to give ordination.

And here it seems abundantly plain, that, if you have no power to follow the process out to its proper termination,—if you have not the means of compelling admission,—it is difficult to understand how there should be jurisdiction to declare an obligation which the Court cannot enforce, or to order a party to be taken on trial where there is no power to see justice done, or to correct any abuse which, with reference to their trials, may be committed.

My learned friend has said that the remedy was a matter of after consideration ;—that all the pursuers sought now was an authoritative declaration of their right ; that if he obtained that declaration he would know how to find his remedy—although he has not ventured to mention this specially, except, indeed, when he alluded to the possibility of obtaining an interdict ; but that, at all events, it would be quite sufficient if your Lordships' judgment should be given ; and that they relied entirely and implicitly on the majesty of the law.

There is no question, my Lords, that in this country the majesty of the law is all in all :—The majesty of the monarch is but a reflex of the majesty of the law. But the majesty of the law shall then be best consulted when the different courts of this country keep themselves in the exercise of their powers, within their proper jurisdiction ; and do not commit encroachments on

the peculiar provinces of each other. The constitution of this country has invested its courts not only with powers different in degree, but different in kind, and each exclusive of the other. Your Lordships exercise supreme jurisdiction as a court of law, and in all matters of civil right; but, with a few exceptions not worth mentioning, you have no jurisdiction in matters criminal. The Court of Justiciary has its supreme jurisdiction over crime, to the extent even of excluding appeal to the House of Lords; and the Court of Exchequer, to give another instance, has an exclusive jurisdiction in matters of revenue. We have heard cases put, which I think it was almost indecent to have put in this place, of such collision between the different jurisdictions of these courts. That your Lordships should interdict the Court of Justiciary from proceeding to the exercise of those functions which, as a Supreme Court, have been exclusively confided to it by the Legislature; or, That they, on the other hand, should interdict your Lordships or the Court of Exchequer in the discharge of those duties which are peculiarly your own. Such a thing could not happen without an absolute subversion of the constitution. It would be "confusion worse confounded," and not only would the majesty of the law be insulted and degraded in such a contest, but law itself would be lost or destroyed, were those courts, which are her authoritative organs, to come to a conflict, which the constitution, not deeming possible, has provided no means of determining, but which could only be settled apparently by the weight of the mace, and the physical force of the officers and apparitors of the court. Where the law has distributed her power among different tribunals, assigning each their proper sphere:—Where she has appointed her agents and ministers to move in peculiar and exclusive paths, she is there disobeyed, and the respect due to the majesty of the law is there forgotten, where one tribunal trespasses upon the proper province of another; or where her ministers and agents, leaving the path to which they ought to be confined, encroach upon the limits assigned exclusively to others.

The conflict between two supreme jurisdictions is the worst of all evils, admitting of no remedy except by the direct interference of the state through the Legislature. Different courts for different objects may be required to consider the same question, and perform different duties. The Church Courts, for example, with reference to a question of ordination, may be called on to exercise a judgment as to the civil right of patronage, in order to explicate their own jurisdiction. Your Lordships, in like manner, may be called on to form a judgment as to whether an ordination is legal and effectual, in order to the determination of a civil right: And in forming that incidental judgment, which is thus become necessary in the exercise of your own jurisdiction, your Lordships

will have regard to the law of the Church, as the church courts, in the other case, would be bound to look to the law as administered by your Lordships. Even if different results were come to in such a question—nay if the interests of the same individual came to be apparently affected by the different decisions to which the civil and church courts might have come to in the matter,—unfortunate though the results would be, there would still be no conflict of jurisdiction ; because what the courts have ultimately adjudicated, was matter within their own province, and they have only incidentally touched upon what fell within the sphere of another tribunal. This would be just the same sort of case as might happen, where the Court of Justiciary is called on to determine the legality of a marriage as an element in trying the case of bigamy ; or where the Court of Session might be required to investigate a crime, in order to determine a civil right arising in consequence of that crime being committed.

The Dean of Faculty, warmed with the theme of the majesty of the law, has crossed the Atlantic for illustration, and,—having pronounced a passing eulogy upon Washington and Hamilton, as the founders of the American constitution,—has referred to the United States Court, as furnishing an instance of the respect, which, in all civilized countries, is due to the majesty of the law. It was perhaps unnecessary, to go so far to prove or illustrate what I trust is better established in this realm than elsewhere on the globe : But no doubt the United States Court, deciding on questions arising out of the federal treaty of America, affords one of the most magnificent and imposing spectacles which any constitution can present. I willingly follow the pursuers in this illustration, which, rightly understood, will be found to enforce not their argument, but that of the defenders.

Your Lordships are perfectly aware that the American constitution rests upon a treaty between several independent states, each of which retain its separate Legislature in many respects supreme, and for many purposes of internal government ; and its separate courts and tribunals. By their mutual treaty, these states did not surrender all their powers. They made certain mutual sacrifices. They agreed to establish a common legislature which in certain respects should be supreme, but which has no power and no authority to bind the states separately, except in so far as it derives it from the federal treaty which forms the basis of their constitution. It was necessarily foreseen, that questions might arise in the construction of this treaty, as in that of any other treaty or in any written instrument, and it was therefore provided, and most wisely, that these questions should be determined by a peculiar court which the constitution provided. An act of Congress itself,—the legality of that act of

Congress with reference to the treaty,—may be matter of question before that Court, because Congress having limited powers, and having no power except as conferred by the federal treaty, may exceed these powers, and consequently commit an illegal act, of which the United States Court, as the great constitutional interpreters and expounders of the treaty, are entitled to take cognizance; and, if they find it beyond the powers of Congress, to pronounce it illegal and deny it effect. The same good genius which presided over the nascent fortunes of America, and which gave her such men as Washington and Hamilton, gave her also as the first presiding judge of that Court, a person whose weight of character, deep erudition, suavity and wisdom, whose well-tempered discretion and knowledge of the constitution, and of its practical working, and intimate acquaintance with the feeling and opinions of his countrymen, gave to his decisions such authority, that they have been submitted to implicitly, and without murmur, in all the questions brought before him, of this international description, and depending on the construction of the treaty. History, perhaps, cannot furnish a higher triumph of order and of reason, than that so many jealous states, having separate legislatures in active exercise of their powers, separately armed, and with power to resist, if the will were found, should have bowed with perfect submission to the voice of that civil tribunal, as to a divine oracle of justice.

But how does this apply to the present case? If my learned friend could have shown that the State had given to your Lordships power over the Church in matters ecclesiastical,—had made your Lordships arbiters between the Church and the State—or had put into your hands a jurisdiction to correct any error or excess committed by the Church in the exercise of these exclusive powers, judicial and legislative, which had been conferred on her,—there might have been some analogy, some resemblance between the cases; and he might have told your Lordships to act fearlessly in correcting the errors of the Church when you see, that, even in the recent and more turbulent constitution of America, her civil tribunals did not hesitate to review the proceedings of her common legislature. After all, it was hardly necessary to go so far, and to quote such examples for your Lordships' encouragement, as if the only fear that could exist was not the fear of doing wrong,—for if your decision be right, and within your Lordships' province, there is no country in the world in which it would meet with more absolute and implicit obedience. But the analogy referred to totally fails, and the argument derived from it is without ground, or application, when the constitution of this country is looked to, which has not made the Church in any respect dependent upon the decrees of this Court, nor invested your Lordships

with a supreme power of reviewing her acts, judicial or legislative. As the constitution has given several and independent powers to the Court of Justiciary, to the Court of Exchequer, and to your Lordships, it has also given independent powers to the Church. She has confided not in your Lordships only, but also in the Church—nay the confidence which the State has reposed in the Church is larger, more unlimited and exuberant than that which she has reposed in this Court; for she has given her legislative as well as judicial powers. She has given her right to pronounce legislatively in matters ecclesiastical, and in matters that affect her own internal economy and interest. To interfere, therefore, and declare an act illegal which the Church has done judicially or legislatively in matters within her province were, with great submission, an usurpation on the part of this Court,—not an exercise of any high and peculiar jurisdiction, such as the constitution of America has conferred on the United States Court in respect of the fœderal treaty, but an infraction of the constitution, and an assertion of power which the constitution has denied.

If, therefore, in passing the act of 1834, for the purpose of regulating Calls, the Church has kept within her own limits, and legislated in a matter which the constitution has given to her determination, there is an end of the question. *Your Lordships* cannot review it. If there be abuse, *you* cannot correct it. It belongs to the State, through the Legislature, to correct that abuse. It will not do to say, there is no wrong without a remedy: that is true in the constitution, but the remedy for many wrongs must be found in the Legislature; and there is no sense or justice in the maxim, as it is here used by the pursuers, and it should not have been used at all, if there can be no wrong without redress in this Court. And here, again, in regard to the astringing clause in the act 1592, and admitting that it does impose an obligation on the Church courts, and is an authoritative declaration of that obligation by the Legislature,—admitting that the Church courts may abuse their powers,—still the remedy is not here, because your Lordships could not stretch your hand to correct that abuse, without committing another violation of the constitution, by trespassing on a separate and peculiar jurisdiction not less sacred than your own. It is not meant to be maintained that your Lordships, in any question that may arise, are not entitled to consider a subject matter even ecclesiastical, for the purpose of determining whether it be within your Lordships' jurisdiction or not,—nay, more, it is not meant to be contended that your Lordships are not entitled to pronounce incidentally and collaterally upon ecclesiastical matters, if the decision of it in that view shall be necessary to explicate your proper jurisdiction. What is meant is, that if it be an ecclesiastical matter proper for the cognizance of the Church judicially or legislatively, there is

no review here, and even if there has been abuse and wrong committed the party can have no redress in this Court.

Take the case, to which there can be no doubt, namely, the question of admitted qualification—such as the presentee's possession of that knowledge, or that correctness of doctrine which the Church requires, according to the different tests which she may from time to time impose. She may by her legislative acts, as she has been in use to regulate this matter from time to time, impose tests of such a nature, that if the supreme legislature of the State were asked to pronounce upon them they would not be sanctioned. In judicially exercising her power of examination, she may commit the most grievous wrong by unjustly rejecting a candidate of the best qualifications. But surely in that case it will not be contended—it were monstrous to maintain—that there could be a remedy here, and that your Lordships by yourselves, or by delegating the authority, could supersede the power of the Church, introduce new tests from those which she has adopted, order a new examination according to what might have been satisfactory to your own mind, proceed to declare the person qualified, and then, (by what process, however, the pursuers ingenuity has been unable to show,) declare the pastor entitled to be inducted, and compel ordination. The defenders trust, that your Lordships will weigh the consequence, and pause before entering on a conflict of which it is impossible to foresee the end.

It is useful to speak here of the remedies by which your decree, if it shall be pronounced against the defenders, may be enforced ; for if the matter were to rest on a mere statement or declaration of opinion even judicial, it might be thought little harm would result, and that the conflict might rest there. But a Court of law will not duly consult its own dignity, and will not much exercise the respect due to its proceedings, especially when engaging in a collision of jurisdictions, such as that which unquestionably exists here, if it do not calculate beforehand, and see the way, clearly, to the final extrication of the case by the constitutional assertion of its power. What, then, I ask your Lordships, is the process of remedy ? Suppose the pursuers had the decree of declarator in the terms in which they ask it, Is there any process of adjudication in implement by which the right to the office and a cure of souls could be conferred ? The idea is ridiculous. Shall your Lordships issue letters of horning and caption and compel presbyteries—by which I mean the individual members of presbyteries—under pain of imprisonment, to confer the cure of souls, and constitute the spiritual relation to the congregation ? This cannot be thought of. Shall you interfere by interdict to prevent the spiritual settlement of this parish ? Is there an instance in which this has been done ? Or can it be imagined that the Church would pause for a moment, what-

ever might be the consequence as to the civil right of stipend, if it concerned the great interests of religion and the spiritual welfare of this parish, that it should be instantly supplied with a pastor from the Church? Who can imagine, that the Church would be so lost to her duty as to hesitate a single moment in appointing a pastor, and constituting the spiritual relation between him and his flock, without respect to the civil rights of the patron and the collectors of the Widows' Fund and the presentee.

Your Lordships, therefore, are asked to pronounce a decree, which the party who asks it cannot say how or in what manner it is to be enforced:—which they cannot pretend to say admits of being directly enforced:—which may remain dead and ineffectual, and disregarded by the Church, against whom it is pronounced. Is this a state of things in which the Supreme court of the country should legally engage? Is this a conflict and collision between high constitutional authorities, to which a wise man would commit himself without seeing his course clearly and distinctly to the end? It is the business of the pursuers, who ask you to commit yourselves to this contest, to show how the matter will be cleared in the result. If they cannot do so, their inability to do it should create deep distrust of their cause.

Wednesday, December 13.

THE SOLICITOR-GENERAL.—MY LORD PRESIDENT,—Referring to the observations which I had the honour of addressing to your Lordships yesterday, and which it is not my intention to renew, I maintain, on the part of the Presbytery, in the *first* place, that the Church where she acts within her own province, and not exceeding her power, is not subject to the review or control of this Court, even though her acts should immediately and directly affect civil rights and patrimonial interests. In the *second* place, that even on the supposition of her exceeding her powers, provided she confines herself to matters ecclesiastical, and that her acts do not immediately and directly affect civil rights and patrimonial interests, still there is no review or control in this Court. The remedy, if a case for remedy should exist, is with the Legislature alone: In the *third* place, it is only where the Church exceeds her powers, and, while she exceeds her powers, affects, by her acts, civil rights and patrimonial interests, that this Court can have any jurisdiction to review or control her proceedings. And, in the *fourth* place, all the redress which this Court can give, is not in matters ecclesiastical, or with reference to what falls within the peculiar province of the Church, but with reference only to those civil rights, and patrimonial interests which fall peculiarly within the jurisdiction of this Court; and collaterally only and incidentally within the jurisdiction of the Church.

It was with a view to these propositions that I addressed your Lordships at such length upon the legislative and judicial powers of the Church in matters ecclesiastical, and endeavoured to satisfy you that the call was a matter ecclesiastical, and, as such, within the power of the Church to determine, not judicially only, as every separate case arises for decision in her tribunals, but legislatively, where she was to interfere for the purpose of passing a law which would bind all the tribunals of the Church, as well as every individual belonging to the establishment. If the call be a matter ecclesiastical, and so subject to the exclusive jurisdiction of the Church, and if the Church does not exceed her powers in regulating the Call, the first question that presents itself is, Whether the Act of Assembly 1834, which afterwards became a law of the Church, did or did not exceed her legislative powers? That Act of Assembly was passed for the purpose of regulating the Call; and, in so far as it touches the present case, it merely provides, That if there was a dissent by the male heads of families in communion with the Church, the Call should be held to be inadequate, and the presentee consequently rejected. It has been called the *Veto Act*, but that name has been well termed a nickname. It is not a Veto Act. On the contrary, the principle of the measure is, that all the male heads of families, not actually expressing dissent, shall be held to concur, and the patron and presentee, by the form and conception of the measure, have the benefit of all those whose feelings toward the candidate for the ministry are not such as to make them active opponents to his ordination.

Suppose this act had been otherwise expressed, and that the Church, which has again and again judicially decided upon the concurrence necessary for the Call, should have passed a law, That no concurrence should be sufficient unless there were a majority of the male heads of families concurring, or suppose, without any actual law of the Church being passed to that effect, that by a course of decisions, recurring to the fundamental principles of her constitution, and correcting these by the judgments which have prevailed in her tribunals for so many years, she should have, in several successive cases, refused to sustain a call where the majority of the male heads of families did not concur,—Could it have been said that such judicial decision, or such legislative act, requiring that concurrence, was beyond her power? Could such language have been maintained on the part of those who are ready to vindicate that course of decision by which the Call was reduced to a mockery,—and from being an active concurrence proving a certain acceptableness of the presentee, to be a mere form,—in which the instrument called a Call was sustained as sufficient without a single signature? Could they have

held, that, if the Church had power to reduce what at one time was important and operative into an unsubstantial and ineffectual form, she had not the power to retrace these erroneous steps,—to correct by a new train of judicial decisions those repeated errors of judgment,—and require in the Call the evidence of that actual concurrence, without which there should be no settlement of a minister in the parish?

And this very observation gives the answer to what was so strongly pressed in argument, that she could not delegate to the parishioners the power of judging of the qualification of a minister which the State had conferred upon herself. There is no delegation of power. There is not half so much delegation of power as if, in a question of qualification with reference to the candidate's skill in tongues, she had remitted to persons learned in Greek or Hebrew, to report the result of an examination.—In that case, where she would have availed herself of the skill of others in procuring evidence of the qualification, she would have much more delegated her power, than in taking the consent of a majority of male heads of families to be a test of acceptableness. A concurrence in the presentation is required by the law of the Church. The question is, what shall be the requisite concurrence, and what shall be the proof of it?—And the Church came to say by a legislative act, with the view it may be of correcting a previous train of bad judicial decisions, that they require not a nominal but a real concurrence; and that the only evidence of that concurrence which they will sustain, is, the consent of a majority of male heads of families, proved by the circumstance that a majority do not dissent. This is not a delegation of the power; it is fixing a criterion by which the tribunals of the Church are to be guided. The objection, therefore, about delegation of the duty which she should herself discharge, is truly, as groundless, as the objection that her hands are tied up by the previous judgments of her courts. This cannot fetter her legislative powers, and she delegates nothing where she fixes a criterion of evidence.

At the risk of repeating what I said yesterday, I must again impress on your Lordships' attention, that, if you are satisfied that the Call is an essential part of induction and ordination, it is very immaterial in what it had its origin. That it is an essential part of that process was not denied even by Dr Robertson, and those who before, and with him, attempted to reduce to the lowest possible point the influence of the people in the settlement of their pastors.—They were too wise: They knew too well the constitution of the Church to pretend to say in plain terms, that the Call was a mockery,—a mere form,—a shadow,—not a thing of substance. They might term it concurrence: They might in

each particular case require less and less concurrence as constituting a sufficient Call ; but they never pretended to say that a clergyman could be established without a Call ; and, on the contrary, in 1782, when their predominancy was best established, and when they had most absolute possession of the highest judicial tribunal of the Church, they did not hesitate, in order to quiet the minds of the clergy and laity of the Church, to pass the act by which it was declared that the Call was agreeable to the immemorial and constitutional use of the Church, and that it ought to be continued. Looking at the matter ecclesiastically, therefore, there can be no doubt that the Church has power to regulate the matter of the Call ; and upon this, which is the hingeing point of the case, the argument for the pursuers, distinguished as it has been for learning and research, and erudite and elaborate as it was, has been singularly unsuccessful.

Then how is the jurisdiction of this Court open ? Merely because this action is brought at the instance of a patron and a presentee, who maintain that their interests are affected. If then they are affected by the Church acting in her proper sphere in a matter purely ecclesiastical, and therefore for her cognizance, judicially and legislatively, this Court can give them no redress, even if they could satisfy your Lordships that the acts of which they complain are an injury ; for this plain reason, that patronage was never an absolute and independent right, especially as regards the ordination and induction of a presentee. The presentee could only obtain ordination and induction into the benefice by the concurrence of the Church ; and if the law of the land, because it is the law of the Church, be, that the Church should not concur with the patron to complete the right of the presentee, unless the presentee be acceptable to the parish ; unless the presentee be supported by what the Church rules to be a sufficient Call, there is no interference with the exercise of the patronage, in rejecting a presentee, because he has not those requisites which the law of the Church requires. The point is quite clear, if the question be taken in what all parties admit to be the qualifications of the presentee, then, the Church being confessedly the sole judge, if the Church were to establish rules, however unreasonable, in regard to qualification, or commit injustice, however great, in judging of the qualifications of a candidate in a particular case, the patron has nothing to say. The civil Court can give no redress. His civil right has not been injured in a way of which they can take cognizance, because his civil right in the matter required the concurrence of the Church, and that concurrence the Church has refused, and the civil Courts have no power to control. If the acceptableness of the presentee be a part of qualification, and the Call, or what the law requires

to constitute a sufficient Call, be merely the criterion of that acceptableness, and consequently of that qualification, the case is brought to the same point as if the question were about the presentee's accomplishments, or his sufficiency in doctrine. But if, taking another view, the Call cannot be considered as a proof of qualification in the presentee, but has its origin in a certain concurrence of the flock, which the Church has all along required, still in this view, as well as in the last, that concurrence, and consequently the Call, which is the test of the concurrence, is the condition of the patron's right. It cannot be exercised without that concurrence. The patron has a right to nominate, but not to force a nominee on the parish. He cannot intrude his presentee against the will of the people. The law of the Church from its earliest time has said there shall be no such intrusion : and it has passed acts from time to time, to correct any abuse in this matter, and to prevent the possibility of forcible intrusion. A certain consent, therefore, on the part of the people being required by the Church, is the ground and necessary condition of constituting the spiritual relation of pastor. The patron, or his presentee, has no more right to insist that the presentee shall be inducted without reference to that condition, than either of them has a right to insist that the presentee should be ordained without possessing the qualifications, strictly so termed, which the Church may require : And, therefore, if you come to be satisfied that the Call is a matter for the regulation of the Church, it is in vain to speak of the civil rights of the patron ; because the civil rights of the patron are necessarily subject to the condition of the Call, and subject to a condition which the statute has left with the Church to declare and to enforce.

On the supposition, then, that the Act of Assembly 1834 does restrict and narrow the rights of the patron, still there is no jurisdiction created in this Court, because that civil right and patrimonial interest which alone is for your cognizance, have not been affected, except by the acts of the Church within her proper sphere and province.

Take the case, however, as one in which the Church has exceeded her powers, still the Call is a matter ecclesiastical. There may by possibility have been an abuse in the evidence of concurrence which she has required—or, if it is to be so termed, in the veto, which she has introduced ; but she has not affected directly and immediately the right of patronage, or the patrimonial right of the presentee. She is not encroaching upon the province of the civil courts. She is acting upon her own peculiar jurisdiction ; and if she exceeds her powers there, but does not trench upon any matter which belongs to the jurisdiction of the civil courts, there is no remedy, even supposing a case of

abuse ; because you have no power to redress every wrong committed in every way. Whatever powers of redress you may have in civil questions, and with reference to civil rights, your power is *there only*. It is not to redress abuse in ecclesiastical matters, any more than to redress abuse committed by the Court of Justiciary in matters criminal, or in the Court of Exchequer in matters of revenue. That your Lordships, because the Church abuses those powers which the Legislature has conferred upon her, should think fit to enter her peculiar domain of jurisdiction,—to lay down rules, for instance, in regard to the qualification of ministers,—to decide what shall or shall not be a cause of intrusion against the will of the people,—what shall or shall not be a violation of that law of her foundation,—to say what shall or shall not be a sufficient Call, without which it is impossible there can be a pastoral relation,—that were, with great deference, not to redress a civil wrong by the exercise of civil jurisdiction, but to assume new jurisdiction, and to redress in a civil court an ecclesiastical wrong done by the Church, in a matter purely ecclesiastical. You cannot review any thing which the Church has done ecclesiastically, for the purpose of giving a remedy where there has been no excess of power, whatever may be the consequence to civil right or patrimonial interest, or even where there has been excess of power, unless civil right and patrimonial interest have been immediately and directly affected.

But this is not all. For the Court can give no remedy, and has no jurisdiction therefore for the purpose of redress, unless it can enforce some civil right or patrimonial interest. It is quite intelligible, and there can be no doubt, that you may decide to whom the civil right of patronage belongs,—which of two competing parties shall have the right of presentation—who shall have the stipend—who shall have the manse and glebe—to whom, between two contending parties, the temporalities of any benefice shall belong.—All that is the proper province of the Court, because the subject is matter of civil right and patrimonial interest ; and because the Court has the means of enforcing its judgment by affecting directly a civil and a patrimonial interest. The case has occurred that a party has been ordained to a parish, and inducted to the cure, who has not held a presentation from the real patron ; while the presentee of the real patron has been rejected ; and in which your Lordships have denied the stipend to the person so inducted. Quite right. The Church may have no power, so far as the temporalities of the benefice are concerned, to take the presentee of the pretended patron, and reject the presentee of the true patron, ordaining the former. If they do so, he shall not take the stipend, because the law only gives the stipend to the party who holds a good presentation. And the Court will judge when application is made to them for the

stipend, whether the party demanding that civil right has the title which consists both of a spiritual ordination, and a presentation by the patron.

There are many other cases in which the temporalities of the benefice have, no doubt, very unfortunately been separated from the cure, without blame perhaps either to the civil Courts or to the Church Courts, and without any thing that could be considered as a proper conflict of jurisdiction; because in all the cases that have hitherto occurred, the civil Courts have looked only to the question of patrimonial interest, and have never trespassed on the rights of the Church. But when you are asked to declare finally, and without reference to patrimonial interests, That the Presbytery are under certain obligations to induct and ordain,—when, with reference to the demand, remedial measures are hinted at, by which the presbytery, in implement of that obligation, may be compelled to induct and ordain,—it is leaving the matter of patrimonial right and interest entirely open, and requiring your Lordships to supersede the power of the Church, to act as her absolute master,—to the effect even of compelling her to impart the spiritual gift implied in ordination.

Your Lordships in the course of this argument will be pleased to recollect, that the only party here is the Presbytery of Auchterarder. The Collector of the Widows' Fund, and the heritors of the parish, have been cited as defenders in this summons; and there are various conclusions directed against them, and with reference to their interest; but they are not parties to this discussion. In so far as they are concerned the action is in abeyance. The question here is exclusively with the Presbytery; and it is of the last importance to attend to this circumstance. There is no other party concerned in the present argument, nor is there any conclusion of the summons now before your Lordships, except the first declaratory conclusion which is directed against the Presbytery and the Presbytery alone.

When my learned friend, therefore, referred to the other conclusions in regard to the stipend, manse, and glebe, which are the temporalities of the benefice, and are no doubt therefore civil rights, and patrimonial interests, as to which, with proper parties, and in a proper action, your Lordships' judgment may be required, he did that which is quite out of the present discussion. The pursuers were not so entitled to change the tables on the defenders, and after going into the argument with them upon the supposition that they were the only parties, and that the declaratory conclusion was the only one as to which debate was raised, to attempt to better their case by referring to the patrimonial conclusions touching the stipend, when the parties concerned in these conclusions are not now before you, and when

the action, as regarded these, was by consent suspended. The observation, therefore, made by the pursuers on that point will be disregarded, and the action will be considered as one in which the Presbytery alone are the defenders; and the only conclusion is the first declaratory conclusion. They have no right to take the question otherwise; and so taken, it is submitted, on the part of the defenders, with great confidence, that it is not an action which embraces any thing like civil right, or patrimonial interest; but which is limited entirely to ecclesiastical matters, which the Church, exercising her undoubted judicial and legislative powers, has chosen to regulate. The result is, as the defenders view the case, that the Church has not acted beyond her powers;—that even if she had acted beyond her powers, the abuse is not one for the cognizance of the Court; and that the remedy sought in this action is not a remedy which it is competent for this Court to grant.

I shall advert immediately to the cases which have been stated on the other side as authorities, and I think I shall be able to show that they do not make for the defenders, but directly against them; as being all of them cases in which the Court has founded its jurisdiction upon civil right and patrimonial interest on the one hand, and given effect to it by enforcing civil right and patrimonial interest on the other. But leaving that for a moment out of view, it is impossible for me, with reference to the consequences which may attend your Lordships' judgment, not to call your attention very explicitly and directly to the situation in which decree pronounced in the terms demanded by the pursuers, would infallibly place the defenders, whether considered individually or collectively, as one of the inferior tribunals of the Church. The Presbytery of Auchterarder are bound to obey the laws of the Church. The act of 1834 is binding upon them as an interim Act of Assembly; and has been rendered, if possible, more certainly and absolutely imperative, by having passed through the presbyteries, and after the consent obtained of a great majority of these, been re-enacted by the General Assembly. They cannot disobey the provisions of that act without not merely incurring the displeasure of their superiors, but violating their duties as churchmen, and exposing themselves to the highest penalties and censures. If your Lordships pronounce a decree, finding that they are bound to ordain a presentee, in the circumstances in which this law of the Church, recently enacted, and in full force, has declared they shall not ordain him, either the decree of this Court shall be vain and idle, and a mockery; or if it shall be attempted to be enforced by some of those personal remedies to which the pursuers have referred, the presbytery of Auchterarder will be placed in the intolerable position of necessarily

committing contempt of your decree on the one hand, or disobedience to their spiritual superiors on the other. The church courts cannot indeed incarcerate, but they may drive them from their profession. They may recall their ordination, and strip them of their character as ministers,—a consequence more penal in their eyes, and more intolerable, than the dungeon itself. The choice presented to them, in such a case, will be, either this consequence, or the penalties which your Lordships are prepared to inflict for contempt of Court,—that remedy of imprisonment, which a vindictive party, using your Lordships' decree, and the executorial of the law may choose to enforce. This is not a light matter. It requires to be well weighed before a step is taken, which necessarily brings things to this dilemma. Deep and heavy is the responsibility on the party that forces matters into such a position; and weak is the man who thinks that the presbyteries of the Church have so little regard to her cause, or so poor a feeling of the obedience which they owe to her, that they will not suffer any privations rather than fail in their allegiance to her. Their allegiance to her they know to be allegiance to the law, while she shall act within the powers which the State has conferred upon her in matters purely within her own province, and where no question occurs in regard to any civil right, or any patrimonial interest, which they as a presbytery have no right to give or withhold.

And now, before concluding, I wish to make a few observations on the different cases which have been so much founded upon by the pursuers. If I do not greatly mistake, they will prove inconsistent with their argument, and favourable to those views only which the defenders maintain.

The first case is the case of *Auchtermuchty*, which will be found to have involved a question purely of civil right. In January 1733 the parish became vacant; and in May a presentation was laid before the presbytery of Auchtermuchty in favour of Mr Mathew Moncrieff, probationer, signed by Lady Newark and Captain George Moncrieff, calling themselves the united patrons of the parish. Objections were offered to the presbytery by the magistrates of Auchtermuchty, and other parishioners, upon the ground, *inter alia*, that neither Lady Newark nor Captain Moncrieff had produced any title to the patronage, nor were they in possession of it. Ultimately, and in the course of the proceedings before the Commission and the General Assembly, this objection was removed by production of the titles; so that the right of these parties as patrons, and, consequently, the validity of the presentation in favour of Mr Moncrieff, was established. But before these titles were produced, and proceeding upon the patrons' failure to produce them, and on the want

of evidence of their right by possession, or otherwise, the presbytery had proceeded to appoint the moderation of a Call at large, on the ground that the presentation had fallen to them *jure devoluto*. A Call was given in favour of Mr Patrick Maxton from the whole elders, and a great number of heritors, including the town-council of Auchtermuchty. The Presbytery sustained this Call, but the Commission reversed their sentence, in respect of titles to the patronage produced at the bar of the Commission, and by a committee of their own number settled Mr Moncrieff, whose Call was signed by a minority; but the settlement was reversed by the General Assembly, on the ground that the Commission had exceeded their powers in receiving and judging of the titles newly produced; and ultimately the Presbytery of Cupar, having taken trial of Mr Maxton's qualifications, admitted and ordained him to be minister of the parish.

It was in these circumstances that Captain Moncrieff, as patron, brought an action in the Court of Session, not for the purpose of undoing Mr Maxton's settlement, or forcing the Church to induct Mr Moncrieff, his presentee; but for the purpose of having it found, that he, as patron, was entitled to retain the stipend for pious uses, as in the case of a vacancy, because the settlement of Mr Maxton was irregular and illegal, and could not, therefore, be regarded by the Court, in any question of civil right which involved the validity of that settlement. The action was a suspension, at Captain Moncrieff's instance, of a threatened charge for stipend. The Court accordingly found, "That the right to a stipend is a civil right; and therefore, that the Court have a power to cognosce and determine upon the legality of the admission of ministers, *ad hunc effectum*, whether the person admitted shall have right to the stipend or not."

These are the very words of the judgment. There was no declaration by the Court of their title generally to cognosce and determine on the legality of the admission of a minister; but only specially to consider it, and decide upon it, with reference to the civil interests which it might involve, and which were brought in issue before them; and, accordingly, the judgment is grounded upon the declaration, that stipend is a civil right, and the Court take power to consider the settlement, in respect of the patrimonial interest involved in the depending suit as to the civil right of stipend. Following out this view, the Court pronounced a farther interlocutor in these terms: "That Presbyteries refusing a presentation duly tendered to them in favour of a qualified minister, against which presentation, or presentee, there lies no legal objection; and upon admitting another person to be minister, the patron has right to retain the stipend, *as in the case of a vacancy*; and, therefore, find the reasons of suspension relevant."

The procedure here is quite plain. The Court acted in a manner the most cautious; they totally abstained from pronouncing any judgment upon the settlement of the minister; they acted only in respect of the stipend, which was the civil right involved; and took cognizance of the settlement merely in so far as it was necessary to do so for the purpose of adjudicating on the civil right. Nothing can be more clear and distinct, nor is it possible to figure a case in which the Court confined itself more exclusively, and with more caution, to its separate jurisdiction.

A circumstance did occur in this case of Auchtermuchty; namely, that an advocacy was brought to the Court of Session at the instance of Captain Moncrieff, of the proceedings before the presbytery,—an advocacy which was ultimately found incompetent; but it would appear that the Presbytery having gone on with these proceedings, in the face of a sist pronounced in the advocacy, Captain Moncrieff had presented a petition complaining of that proceeding as a contempt of Court. Even if the Court had entertained this last complaint to any serious effect, it would not have shown that they held themselves to possess a jurisdiction to interfere with the Presbytery in a matter purely ecclesiastical. The case, in fact, was decided on the merits of the advocacy; but the Presbytery having had a sist served upon them, even if the advocacy were incompetent, must have been answerable for not obeying your order. That, however, is entirely another matter, and depending merely on this, Whether, if you do pronounce a sist against any party, disobedience will not infer a contempt of Court. It is in vain to appeal to this incidental proceeding, even if of larger consequence than can be pretended, when the grounds on which the Court ultimately acted, are clearly established by the terms of its judgment.

Then you have the important case of *Dunse*, reported by Falconer; and also by Lord Monboddo, whose very valuable reports were given to the profession in the Supplement to the Dictionary of Decisions published in 1826. In that case a declarator was brought at the instance of Mr Hay, as patron of the parish of Dunse, against the Presbytery of Dunse, to have it found and declared that he was patron of the parish; that he had presented a person who was duly qualified to accept by taking the oaths to Government; that he had accepted, and that the Presbytery had no right *pro hac vice tanquam jure devoluto*. The occasion of this process was the Presbytery's appointing a moderation of a Call at large notwithstanding the patron's presentation.

Now it is clear that here was a question of civil right distinctly raised between these parties. They were competing for the right of patronage; the Presbytery claiming it as their right *jure devoluto*; and the patron insisting that he had duly exer-

cised his right, and that it had not fallen to the Presbytery. Even in this case a great deal of difficulty was entertained; and the Presbytery maintained, in respect of various statutes, that the matter could only be discussed before the General Assembly; and that it was not a subject for a civil process in this Court. But the instructive part of the report is the ground on which the pursuers maintained their demand, for they urged, *first*, that the only design of the declarator was to establish the patron's right against the Presbytery, who claimed the presentation *jure devoluto*; and *secondly*, that, in that particular, nothing was concluded as to the Church's power of examination and ordination, —that the process only related to the patron's right to present, and the presentee's right to accept.

The question came ultimately to depend on whether the patron had presented in due time; and whether a party holding a patronage in trust for an unqualified person could present; and the Court ultimately repelled the objection to the pursuer's—that is the patron's right, and to the person by him presented, and found that the pursuer had sufficient right to present, and that the right had not fallen to the presbytery *tanquam jure devoluto*. But, as Lord Monboddo's report expressly bears, there were other two conclusions of the declarator, which the Lords would not meddle with. “The one was, that the stipend did belong to the patron till the presentee was settled. This the Lords did not think competent to be declared against the presbytery, who never could have any right to the stipend: The other was, that the presbytery ought to be discharged to moderate a call at large, or settle any other man; because that was interfering with the power of ordination, or the internal policy of the Church, with which the Lords thought they had nothing to do.”

The case of Lady Forbes against Mr M'William, February 1762, is the next case; in which it was found that a minister settled by a fiat whose right to the patronage was afterwards found to be invalid, was not entitled to the stipend, although settled. The spiritual relation was there constituted, and no attempt was made on the part of the civil courts to disturb the settlement, nor is there the slightest trace of that having ever been done. But a question arose by Mr M'William, the incumbent, charging the heritors for payment of his stipend. The charge was suspended, and the Court here took into consideration the validity of his induction, for the purpose, merely, of explicating their own jurisdiction, and determining the patrimonial question of stipend, which alone was before them.

The case of *Culross* comes next. That was decided in June 1751; but nothing was there decided, except, that a minister having been settled, while there was a suit concerning the right

APPENDIX.

No. I.

I. OVERTURE and INTERIM-ACT ON CALLS.

Edinburgh, May 31, 1834.—THE General Assembly declare, That it is a fundamental law of this Church, that no pastor shall be intruded on any congregation contrary to the will of the people ; and, in order that this principle may be carried into full effect, the General Assembly, with the consent of a majority of the Presbyteries of this Church, do declare, enact, and ordain, that it shall be an instruction to Presbyteries, that if, at the moderating in a Call to a vacant pastoral charge, the major part of the male heads of families, members of the vacant congregation, and in full communion with the Church, shall disapprove of the person in whose favour the Call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the Presbytery rejecting such person, and that he shall be rejected accordingly, and due notice thereof forthwith given to all concerned ; but that, if the major part of the said heads of families shall not disapprove of such person to be their pastor, the Presbytery shall proceed with the settlement according to the rules of the Church : And farther declare, that no person shall be held to be entitled to disapprove as aforesaid, who shall refuse, if required, solemnly to declare, in presence of the Presbytery, that he is actuated by no factious or malicious motive, but solely by a conscientious regard to the spiritual interests of himself or the congregation.

The General Assembly agree to transmit the above Overture to Presbyteries for their opinion, and, without a vote, convert the same into an Interim-Act.

II. OVERTURE, WITH REGULATIONS, for carrying the above Act into effect.

Edinburgh, June 2, 1834.—WHEREAS the General Assembly have declared, enacted, and ordained, in terms of their Act, passed in the sederunt of 31st May ult., on the subject of the moderating in of Calls ;

and whereas it is necessary, for the better regulating the forms of proceedings under that Act, that some precise and definite rules should be laid down, the General Assembly do, therefore, with the consent of a majority of the Presbyteries of this Church, declare, enact, and ordain, that the following directions and regulations shall be observed :

1. That when any presbytery shall have so far sustained a presentation to a parish, as to be prepared to appoint a day for moderating in a call to the person presented, they shall appoint one of their own number to preach in the church of the parish on a day not later than the second Sunday thereafter ; that he shall, on that day, intimate from the pulpit that the person presented will preach in that church on the first convenient Sunday, so as it be not later than the third Sunday after such intimation ; and that he shall, at the same time, intimate, that on another day, to be fixed, not less than eight, nor more than ten days after that appointed for the presentee to preach, the Presbytery will proceed, within the said Church, to moderate in a call to such person to be minister of the said parish in the usual way ; but that the presbytery, if they deem it expedient, may appoint the presentee to preach oftener than once, provided that the day for moderating in the call be not more than six weeks after that on which the presentation has been sustained.

2. That, on the day appointed for moderating in the call, the Presbytery shall, in the first instance, proceed in the same manner in which they are in use at present to proceed.

3. That if no special objections, and no dissents, by a major part of the male heads of families, being members of the congregation, and in full communion with the Church, according to a list or roll to be made up and regulated in manner herein-after directed, shall be given in, the Presbytery shall proceed to the trials and settlement of the presentee, according to the rules of the Church.

4. That it shall be competent to any one or more of the heads of families in the parish, in full communion with the Church, by themselves, or by an agent duly authorized, to state any special objections to the settlement of the person presented, of whatever nature such objections may be ; and that, if the objections appear to be deserving of deliberate consideration or investigation, the Presbytery shall delay the further proceedings in the settlement till another meeting, to be then appointed, and give notice to all parties concerned, then to attend, that they may be heard.

5. That, if the special objections so stated affect the moral character or the doctrine of the presentee, so that, if they were established, he would be deprived of his license, or of his situation in the Church, the objectors shall proceed by libel, and the Presbytery shall take the steps usual in such cases.

6. That if the special objections relate to the insufficiency or unfitness of the presentee for the particular charge to which he has been appointed, the objectors shall not be required to become libellers, but shall simply deliver, in writing, their specific grounds for objecting to the settlement, and shall have full liberty to substantiate the same ; upon all which the presentee shall have an opportunity to be fully

heard, and shall have all competent means of defence : That the Presbytery shall then consider these special objections, and, if it shall appear that they are not sufficient, or not well founded, they shall proceed to the settlement of the presentee, according to the rules of the Church ; But if the Presbytery shall be satisfied that the objector or objectors have established that the presentee is not fitted usefully and sufficiently to discharge the pastoral duties in that parish, then they shall find that he is not qualified, and shall intimate the same to the patron, that he may forthwith present another person ; it being always in the power of the different parties to appeal from the sentence pronounced by the Presbytery, if they shall see cause.

7. That if it shall happen that, at the meeting for moderating in the call, dissents are tendered by any of the male heads of families, being members of the congregation, and in full communion with the Church, their names standing on the roll above referred to, without the assignment of any special objections, such dissents shall either be personally delivered in writing by the person dissenting, or taken down from his oral statement by the moderator or clerk of the Presbytery.

8. That if the dissents so lodged do not amount in number to the major part of the persons standing on the roll, and if there be no special objections remaining to be considered, the Presbytery shall proceed to the trials and settlement, according to the rules of the Church.

9. That if it shall appear that dissents have been lodged by an apparent majority of the persons on the said roll, the Presbytery shall adjourn the proceedings to another meeting, to be held not less than ten days, nor more than fourteen days thereafter.

10. That if the Presbytery deem it expedient, and the person presented be willing, or if he shall desire so to do, the Presbytery shall appoint him to preach to the congregation in the interval.

11. That it shall not be competent to receive any dissents without cause assigned, except such as shall be duly given in at the meeting for moderating in the call, as above provided ; but it shall be competent to any person, who may have lodged a dissent at that meeting, to withdraw such dissent at any time before the Presbytery shall have given judgment on the effect of the dissents.

12. That, in case the Presbytery shall, at the second meeting appointed, find that the major part of the persons entitled to dissent do not adhere to their dissents, or that there is not truly a majority of such persons on the roll dissenting, they shall sustain the call, and proceed to the trials and settlement.

13. That, in case the Presbytery shall at that meeting find that there is a majority of the persons on the roll still dissenting, it shall be competent to the patron or the presentee, or to any member of the Presbytery, to require all or any of the persons so dissenting to appear before the Presbytery, or a committee of their number, at a meeting to be appointed, to take place within ten days at furthest, at some place within the parish, and there and then to declare in terms of the resolution of the General Assembly ; and if any such person shall fail to appear, after notice shall have been duly given to him, or shall refuse

to declare in the terms required, the name of such person shall be struck off the list of persons dissenting, and the Presbytery shall determine whether there is still a major part dissenting or not, and proceed accordingly.

14. That, if the Presbytery shall find that there is at last a major part of the persons on the roll dissenting, they shall reject the person presented, so far as regards the particular presentation, and the occasion of that vacancy in the parish ; and shall forthwith direct notice of this their determination to be given to the patron, the presentee, and the elders of the parish.

15. That if the patron shall give a presentation to another person within the time limited by law, the proceedings shall again take place in the same manner as above laid down ; and so on in regard to successive presentations within the time.

16. That if no presentation shall be given within the limited time, to a person from whose settlement a majority on the roll do not dissent, the Presbytery shall then present *jure devoluto*.

17. That cases of presentation by the Presbytery *jure devoluto*, shall not fall under the operation of the regulations in this and the relative act of Assembly, but shall be proceeded in according to the general laws of the Church applicable to such cases. But every person who shall have been previously rejected, shall be considered as disqualified to be presented to that parish on the occasion of that vacancy.

18. That in order to ascertain definitely the persons entitled, at any particular time, to give in dissents, every kirk-session of the Church shall be required, within two months after the rising of the present Assembly, to make out a list or roll of the male heads of families, who are, at the date thereof, members of the congregation, and also regular communicants, either in that parish, or some other parish of the Church ; of which, in the latter case, proper evidence shall be produced to the kirk-session.

19. That the roll so made up shall be inserted in the kirk-session record, and shall be transmitted to the Presbytery ; and after being inspected by the Presbytery, and countersigned on each page by the moderator, shall be returned to the kirk-session, and form part of its records for the foresaid purposes.

20. That the said roll shall be revised and readjusted immediately after the occasion of dispensing the Sacrament in the parish which shall have last preceded the 22d of November in each year, and shall be retransmitted to the Presbytery within the first week in December.

21. That the said list or roll, as last revised, immediately before the vacancy in the parish, shall be the only roll for determining the persons entitled to be reckoned in any dissents to be offered in the manner above set forth, against the admission of any presentee to be minister, in the moderating in a call, provided that it shall not be made to appear that they, or any of them, have ceased to be members of the congregation.

22. That the Presbyteries of the Church shall use their utmost endeavours to bring about harmony and unanimity in congregations, and

be at pains to avoid every thing which may excite or encourage unreasonable exceptions in people against a worthy person that may be proposed to be their minister.

The General Assembly agree to transmit the above overture and regulations to Presbyteries for their opinion ; and, in the meantime, without a vote, they convert the same into an interim-act.

The General Assembly further declare, that cases in which the vacancies have taken place before the rising of the present Assembly, shall not fall under the operation of the regulations in this and the relative acts of Assembly, but shall be proceeded in according to the general laws of the Church.

No. II.

RECORD.

 I. AMENDED SUMMONS OF DECLARATOR.—THE EARL OF KINNOUL, &c.
 AGAINST THE PRESBYTERY OF AUCHTERARDER, &c.

WILLIAM, &c.—Whereas it is shown to us by our right trusty and well-beloved cousin, Thomas Robert, Earl of Kinnoull, heritable proprietor of the right of patronage of the Church and parish of Auchterarder, lying within the bounds of the Presbytery of Auchterarder, and county of Perth; and humbly meant and shown to us by our love, Robert Young, preacher of the gospel, and presentee to the said church and parish of Auchterarder: That by the statute 1567, ch. 7, entituled an act “Anent the admission of Ministers: Of laick patronages;” it is statute and ordained, “That the examination and admission of ministers, within this realm, be only in the power of the kirk now openly and publicly professed within the samin. The presentation of laick patronages alwaies reserved to the just and ancient patrones, and that the patroun present ane qualified persoun, within sex monethes, (after it may cum to his knowledge, of the decease of him quha bruiked the benefice of before,) to the superintendent of thay partis, quhair the benefice lyes, or uthers havand commission of the kirk to that effect; utherwaies the kirk to have power to dispone the samin to ane qualified person for that time:” That by the statute 1592, ch. 116, entituled “Ratification of the liberty of the treu kirk—of general and synodal assemblie of Presbyteries; of discipline; all laws of idolatrie ar abrogate; of presentation to benefices:” It is, *inter alia*, enacted and ordained, That “all presentations to benefices to be direct to the particular Presbyteries in all time cumming; with full power to give collation thereupon; and to put ourdour to all matters and causes ecclesiasticall, within their bounds, according to the discipline of the kirk; Providing the foresaides Presbyteries be bound and astricted to receive and admit quhatsumever qualified minister presented be his Majesty or laick patrones:” That by another statute of the same year, (1592 ch. 117,) it is enacted and provided, that “in case the Presbytery refuses to admit any qualified minister presented to them be the patron, it shall be lawful to the patron to retain the haill fruits of the

“ said benefice in his awin hands :” That the statute 10th Queen
 Anne, ch. 12, proceeds on the following preamble, and contains, *inter*
alia, the following enactments: “ Whereas, by the ancient laws and
 “ constitutions of that part of Great Britain called Scotland, the pre-
 “ senting ministers to vacant churches did of right belong to the pa-
 “ trons, until by the 23d act of the second session of the first Parlia-
 “ ment of the late King William and Queen Mary, held in the year
 “ 1690, (entituled Act concerning Patronages,) the presentation was
 “ taken from the patrons, and given to the heritors and elders of the
 “ respective parishes ; and in place of the right of presentation, the he-
 “ ritors and liferenters of every parish were to pay to the respective pa-
 “ trons a small and inconsiderable sum of money, for which the patrons
 “ were to renounce their right of presentation in all times thereafter :
 “ And whereas, by the 15th act of the fifth session, and by the 13th
 “ act of the sixth session of the first Parliament of the said King Wil-
 “ liam, the one entituled an act for encouraging of preachers at vacant
 “ churches benorth Forth, and the other entituled act in favours of
 “ preachers benorth Forth ; there are several burdens imposed upon
 “ vacant stipends, to the prejudice of the patron’s right of disposing
 “ thereof : And whereas that way of calling ministers has proved in-
 “ convenient, and has not only occasioned great heats and divisions
 “ among those who, by the aforesaid act, were entituled and authoriz-
 “ ed to call ministers, but likewise has been a great hardship upon
 “ the patrons, whose predecessors had founded and endowed those
 “ churches, and who have not received payment or satisfaction for
 “ their right of patronage from the aforesaid heritors or liferenters of
 “ the respective parishes, nor have granted renunciation of their said
 “ rights on that account.” And therefore it is enacted, “ That the
 “ aforesaid act made in the year 1690, (entituled Act concerning Pa-
 “ tronages,) in so far as the same relates to the presentation of minis-
 “ ters by heritors and others therein mentioned, be, and is hereby re-
 “ pealed and made void ; and that the aforesaid 15th act of the fifth ses-
 “ sion, and 13th act of the sixth session of the first Parliament of King
 “ William, be, and are hereby likewise repealed and made void ; and
 “ that, in all time coming, the right of all and every patron or patrons
 “ to the presentation of ministers to churches and benefices, and the
 “ disposing of the vacant stipends for pious uses within the parish,
 “ be restored, settled, and confirmed to them, the aforesaid acts, or
 “ any other act, statute, or custom to the contrary, in anywise not-
 “ withstanding ; and that from and after the 1st day of May 1712,
 “ it shall and may be lawful for her Majesty, her heirs and successors,
 “ and for every other person, or persons, who have right to any patro-
 “ nage or patronages, of any church or churches whatsoever, in that
 “ part of Great Britain, called Scotland, (and who have not made and
 “ subscribed a formal renunciation thereof under their hands,) to pre-
 “ sent a qualified minister or ministers to any church or churches,
 “ whereof they are patrons, which shall at any time, after the said 1st
 “ day of May, happen to be vacant ; and the Presbytery of the respec-
 “ tive bounds shall, and is hereby obliged to receive and admit, in the
 “ same manner, such qualified person or persons, minister or minis-

November ; “ and the Presbytery deeming it expedient that he should “ preach oftener than once before the moderation of his call, appoint “ Mr Clark at sametime to intimate, that Mr Young will preach there “ on the 23d of the same month. The Presbytery further appointed “ Mr Clark to intimate, that the Presbytery of Auchterarder will “ meet in the church of Auchterarder, on the first Tuesday of Decem- “ ber next, being the 2d day of that month, to moderate in a call, in “ the usual way, to Mr Young, to be minister of that parish, the mo- “ derator to preach and preside. In all which sentence of the Pres- “ bytery Mr Moncrieff acquiesced, and took instruments in the clerk’s “ hands. From which sentence of the Presbytery, in so far as it at “ all sustained the presentation, Messrs Mackenzie and Walker dis- “ sented, on the ground that, by so doing, the Presbytery did seem to “ homologate and approve of patronage.” That another meeting of Presbytery was held at Auchterarder, on the 2d day of December 1834, for the purpose of moderating in a call to the pursuer, the said Robert Young, to be minister of the church and parish of Auchterarder ; and the minutes of Presbytery bear that, under protest on the part of the pursuer, the said Robert Young, “ the Presbytery then “ proceeded to afford an opportunity to the male heads of families, “ whose names stand upon the roll, to give in dissents on the call and “ settlement of Mr Robert Young, as minister of the parish ;” and the presbytery afterwards found, “ that dissents have been lodged by “ an apparent majority of the persons on the roll inspected by the “ Presbytery.” That at another meeting of the Presbytery of Auchterarder, which was held at Auchterarder on the 7th of July 1835, the said Presbytery did “ reject the pursuer, Mr Robert Young, the “ presentee to Auchterarder, so far as regards the particular presenta- “ tion now on their table, and the occasion of this vacancy in the pa- “ rish of Auchterarder ; and do forthwith direct their clerk to give “ notice of this their determination to the patron, the presentee, and “ the elders of Auchterarder :” That the foresaid judgments or deliv- erances of the said Presbytery, of date 2d December 1834, and 7th July 1835, were *ultra vires* illegal and unwarrantable, in so far as that though, by the laws and statutes before libelled, the Presbytery were bound and astricted to make trial of the qualifications of the pur- suer, Robert Young, as presentee to the church and parish of Auchterarder, and were not entitled to delegate to, or devolve that duty on third parties, or to denude and abandon their right and duty as a church court, to judge of and decide upon the qualifications and fitness of the presentee for the pastoral office and charge ; and after examination by said Presbytery, if the pursuer, the said Robert Young, as presentee foresaid, was found to be duly qualified, the said Presbytery were bound and astricted as aforesaid, to have admitted and inducted him into the office of minis- ter of the church and parish of Auchterarder : Nevertheless, though the pursuer, the said Robert Young, is duly qualified as a licentiate of the Church of Scotland, and presentee foresaid, as well as in all other respects, to be received and admitted minister of the church and pa- rish of Auchterarder, and though no objections have been stated against his qualifications, the Presbytery not only refused, and con-

tinned to refuse, to take the pursuer upon trials, and to pronounce judgment on his qualifications as presentee, or to admit and receive him as minister of the church and parish of Auchterarder, but have, by their sentence, rejected him as presentee to the said church and parish, without trial, without taking cognizance of his qualifications as presentee, and expressly on the ground that they cannot, and ought not to do so, in respect of a veto of the parishioners: In all which respects the said presbytery, and the individual members thereof, have exceeded the powers conferred on them by law, and acted illegally, in violation of their duty, and of the laws and statutes libelled, and that to the serious prejudice of the patrimonial rights of the pursuers: And although the pursuers, as patron and presentee foresaid, have often desired and required the said presbytery, and Mr John Ferguson, minister of Menivaird; Mr James Thomson, minister of Muckhart; Mr John Brown, minister of Glendovan; Mr John Clark, minister of Blackford; Mr William Stodart, minister of Maderty; Mr Peter Brydie, minister of Fossaway; Mr William Mackenzie, minister of Comrie; Mr William Laing, minister of Crieff; Mr Alexander Laird, minister of Ardoch; Mr Samuel Cameron, minister of Monzie; Mr Thomas Young, minister of Gask; Mr James Walker, minister of Muthill; Mr Alexander Maxtone, minister of Fowlis; and Dr James Russell, minister of Dunning, the present individual members thereof, to discharge their duty in terms of law and the statutes libelled, by proceeding with the trials, admission, and final settlement of the pursuer, the said Robert Young, as minister of the Church and parish of Auchterarder: Yet they illegally, contumaciously, and in violation of their duty, and to the serious injury and prejudice of the patrimonial rights of the pursuers, refused, and continue to refuse, so to do: Therefore, it ought and should be found and declared, by decree of the Lords of our Council and Session, that the pursuer, the said Robert Young, has been legally, validly, and effectually presented to the Church and parish of Auchterarder: That the Presbytery of Auchterarder, and the individual members thereof, as the only legal and competent Court to that effect, by law constituted, were bound and astricted to make trial of the qualifications of the pursuer, and are still bound so to do; and if, in their judgment, after due trial and examination, the pursuer is found qualified, the said Presbytery are bound and astricted to receive and admit the pursuer, as minister of the church and parish of Auchterarder, according to law: That the rejection of the pursuer by the said Presbytery, as presentee foresaid, without making trial of his qualifications in competent and legal form, and without any objections having been stated to his qualifications, or against his admission as minister of the church and parish of Auchterarder, and expressly on the ground that the said Presbytery cannot, and ought not to do so, in respect of a veto of the parishioners, was illegal and injurious to the patrimonial rights of the pursuer, and contrary to the provisions of the statutes and laws libelled: And it being so found, or in the event of the said Presbytery still continuing to refuse to discharge their duty, by proceeding in the trials of the pursuer as presentee, and in his induction as minister of the church and parish of Auchterarder, the said Robert

Young, pursuer, ought and should be found and declared, to have the just and legal right to the constant, localled, and modified stipend, with the manse and glebe, and whole other emoluments pertaining and belonging to the church and parish of Auchterarder, and that for crop and year 1835, and in time coming during all the days and years of his life: And it being so found and declared, the said Presbytery of Auchterarder, and the said Mr John Ferguson, &c. &c. the present individual members thereof, and their successors, and Dr Andrew Grant, one of the ministers of Edinburgh, collector, nominated and appointed under the several statutes, passed for the better raising and securing a fund for a provision for the widows and children of ministers of the Church of Scotland, and all others, ought and should be decerned and ordained, by decretet foresaid, to desist and cease from molesting and disturbing the pursuer, the said Robert Young, in the possession and enjoyment in time coming, during his life, of the said localled and modified stipend, manse and glebe, and whole other emoluments, belonging and pertaining to the said church and parish of Auchterarder: And it being so found, decerned, and declared, James Beveridge Duncan for the lands of Damside, &c. &c. (here follow the names of the heritors) heritors of the said parish of Auchterarder, ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer, the said Robert Young, of the stipend payable by each of them respectively, according to their several proportions, in terms of the subsisting decrees of locality, and that for crop 1835, and at the usual terms of payment, in time coming, during the life of the pursuer, the said Robert Young: And farther, to perform and fulfil all the other obligations incumbent upon them as heritors, to the pursuer, the said Robert Young, as legally, validly, and effectually, presented as aforesaid to the said church and parish of Auchterarder; or otherwise, it ought and should be found and declared, by decretet foresaid, that the pursuer, Thomas Robert, Earl of Kinnoull, has legally, and validly, and effectually exercised his right as patron of the said church and parish of Auchterarder, by presenting the pursuer, the said Robert Young, as aforesaid, to the said church and parish; and that the said Presbytery of Auchterarder, and the individual members thereof, have illegally, and in violation of their duty, and of the several laws and statutes before libelled, refused, and continue to refuse to make trial of the qualifications of the said Robert Young, presentee foresaid, and to admit and receive the said Robert Young, as minister of the church and parish of Auchterarder, but have illegally, and in violation of their duty, and of the laws and statutes libelled, as aforesaid, rejected the said Robert Young, as presentee to the said church and parish; and therefore, that the pursuer, Thomas Robert, Earl of Kinnoull, has right to, and is entitled to receive and retain the whole stipend and emoluments of and pertaining to the said church and parish of Auchterarder, from the date of citation hereto, and in all time coming during the life of the said Robert Young; and it being so found and declared, the said Presbytery of Auchterarder, and the said Mr John Ferguson, &c. &c. Dr Andrew Grant, one of the ministers of Edinburgh, collector, nominated and appointed under the several statutes, passed for the better raising and securing a fund for a provision for the widows and chil-

dren of ministers of the Church of Scotland, and all others, ought and should be decerned and ordained, by decreet foresaid, to desist and cease from molesting and disturbing the pursuer, the said Thomas Robert, Earl of Kinnoull, in the possession and use, in time coming, during the life of the said Robert Young, of the said localled and modified stipend, manse, glebe, and other emoluments belonging and pertaining to the said church and parish of Auchterarder: And it being so found, decerned, and declared, the said James Beveridge Duncan, &c. &c. heritors of the said parish of Auchterarder, ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer, the said Thomas Robert, Earl of Kinnoull, of the stipend payable by each of them respectively, according to their several proportions, in terms of the subsisting decrees of locality, and that from the date of citation hereto, and in time coming, during the life of the said Robert Young; and the said Presbytery of Auchterarder, and the said Mr John Ferguson, &c. &c., the individual members thereof, personally, ought and should be decerned and ordained to make payment to the pursuers of the sum of L. 500 Sterling, or such other sum, more or less, as the said Lords shall modify as the expenses of the process to follow hereon, besides the dues of extracting the decree to be pronounced therein: And the other defenders, the said Dr Andrew Grant, collector of the fund established for the maintenance of the widows of the ministers of the Church of Scotland, &c. &c. heritors of the said parish of Auchterarder, (but only in the event of their offering resistance to the conclusions hereof,) ought likewise to be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of L. 500 sterling, or such other sum, more or less, as the said Lords shall modify as the expense of the process to follow hereon, besides the dues of extracting the decree to be pronounced therein; all conform to the laws and practice of Scotland, used and observed in the like cases, as is alleged.—Our will is, &c. Dated and Signed 5th October 1835.

II. DEFENCES FOR THE PRESBYTERY OF AUCHTERARDER, TO THE SUMMONS OF THE EARL OF KINNOULL, &c.

THE summons in this case, after partially narrating the Acts of Parliament 1567, cap. 7; 1592, cap. 116; 1592, cap. 117; and 10th Anne, cap. 12, proceeds to state, that the pursuer, the Earl of Kinnoull, had executed a deed of presentation in favour of the other pursuer, nominating and presenting him to be minister of the parish and church of Auchterarder, and requiring the defenders to take trial of his qualifications, literature, good life, and conversation, and after having found him fit and qualified for the functions of the ministry of the said church of Auchterarder, to admit and receive him thereto, and give him his act of ordination and admission in due and competent form. That the said presentation, with the relative documents mentioned in the summons, were all given in and read at a meeting of the said Presbytery, and appointed to lie on the table till the next meeting. That at the said next meeting the Presbytery did so far sustain

the presentation as to find themselves prepared to appoint a day for moderating in a call to Mr Young, and appointing certain days for him to preach in the church of Auchterarder. That another meeting of Presbytery was held at Auchterarder, on the 2d day of December 1834, for the purpose of moderating in a call to the pursuer, Robert Young, and that the Presbytery, under protest on the part of Mr Young, then proceeded to afford an opportunity to the male heads of families whose names stand upon the roll, to give in dissents on the call and settlement of Mr Robert Young as minister of the parish. That the Presbytery afterwards found that dissents had been lodged by an apparent majority of the persons on the roll inspected by the Presbytery ; and that, at another meeting, which was held at Auchterarder on the 7th of July 1835, “ the said Presbytery did reject the “ pursuer, Mr Robert Young, the presentee, to Auchterarder, so far “ as regards the particular presentation now on their table, and the “ occasion of this vacancy in the parish of Auchterarder, and do forth- “ with direct their clerk to give notice of this their determination to “ the patron, the presentee, and the elders of Auchterarder.”

The narrative then proceeds in these words, “ That the foresaid “ judgment and deliverance of the said Presbytery is illegal and un- “ warrantable, in so far as, though duly qualified as a licentiate of the “ Church of Scotland, and in all other respects to be admitted and re- “ ceived as minister of the church and parish of Auchterarder, in terms “ of law, and of the deed of presentation foresaid, the said Presbytery “ refused, and contumaciously continue to refuse, to take the said “ Robert Young, pursuer, upon trials, and to pronounce judgment on “ his qualifications as a licentiate of the church, and presentee qualifi- “ ed as foresaid, or to receive and admit him as minister of the said “ church and parish of Auchterarder, in terms of the statutes and pre- “ sentation libelled. In all which respects the said Presbytery, and “ the individual members thereof, have acted illegally, in violation of “ their duty, and of the several statutes libelled, to the serious preju- “ dice of the patrimonial rights of the pursuers.”

Upon this narrative the summons subsumes, that “ the pursuer, as “ patron and presentee foresaid, had often desired and required the “ said Presbytery, and the present individual members thereof, to “ discharge their duty in terms of law and of the statutes before li- “ belled, by proceeding in the trials, admission, and final settlement “ of the pursuer, the said Robert Young, as minister of the church “ and parish of Auchterarder ; yet they illegally and contumaciously, “ and to the serious prejudice of the patrimonial rights of the pur- “ suers, refuse so to do.”

The conclusions of the summons are, not that the defenders should be decerned, in the words of the subsumption, “ to discharge their “ duty in terms of law and of the statutes before libelled, by proceed- “ ing in the trials, admission, and final settlement of the pursuer, the “ said Robert Young, as minister of the church and parish of Auchter- “ arder ;” but, that “ it ought and should be found and declared, by “ decree of the Lords of our Council and Session, that the pursuer, “ the said Robert Young, has been legally, validly, and effectually “ presented to the said church and parish of Auchterarder, and has

“ just and legal right to the constant localled and modified stipend,
 “ with the manse and glebe, and whole other emoluments pertaining
 “ and belonging to the said church and parish of Auchterarder, and
 “ that for crop and year 1835, and in time coming, during all the
 “ days and years of his life : And it being so found and declared, the
 “ said Presbytery of Auchterarder, and the present individual mem-
 “ bers thereof, and their successors, and Dr Andrew Grant, one of the
 “ ministers of Edinburgh, collector, nominated and appointed under
 “ the several statutes passed for the better raising and securing a fund
 “ for a provision for the widows and children of ministers of the
 “ Church of Scotland, and all others, ought and should be decerned,
 “ &c., to desist and cease from molesting and disturbing the pursuer,
 “ the said Robert Young, in the possession and enjoynment, in time
 “ coming, during his life, of the said localled and modified stipend,
 “ manse, and glebe, and whole other emoluments belonging and per-
 “ taining to the said church and parish of Auchterarder.”

Then follows a third conclusion against the heritors for payment to the pursuer, Mr Young, of the stipend paid by each of them respectively, according to their several proportions, in terms of the subsisting “ decrees of locality, and that for crop 1835, and at the usual terms “ of payment in time coming, during the life of the pursuer, the said “ Robert Young ; and, further, to perform and fulfil all the other ob- “ ligations incumbent upon them as heritors to the pursuer, the said “ Robert Young, as legally, validly, and effectually presented as afore- “ said, to the said church and parish of Auchterarder.”

After these three distinct and specific conclusions, the summons proceeds in these alternative terms :—“ Or otherwise, it ought and “ should be found and declared, by decree foresaid, that the pursuer, “ Thomas Robert Earl of Kinnoull, has legally and validly exercised “ his right as patron of the said church and parish of Auchterarder, “ by presenting the pursuer, the said Robert Young, as aforesaid, to “ the said church and parish ; and that the said Presbytery of Auch- “ terarder, and the individual members thereof, have illegally, and in “ violation of their duty, and of the several laws and statutes before “ libelled, refused to admit and receive the said Robert Young, as “ minister of the church and parish of Auchterarder ; and, therefore, “ that the pursuer, Thomas Robert Earl of Kinnoull, has right to and “ is entitled to receive and retain the whole stipend and emoluments “ of and pertaining to the said church and parish of Auchterarder, “ from the date of citation hereto, and in all time coming, during the “ life of the said Robert Young.” And then there follow the same subsidiary conclusions as those before quoted, against the defenders and Dr Grant, “ to desist and cease from molesting and disturbing the “ pursuer, Lord Kinnoull, in the possession of the stipend,” &c. and against the heritors for payment of the said stipend, &c. And then there are two conclusions against the parties before mentioned, for payment of L. 500 of expenses of process.

The acts of Parliament quoted in this summons being public acts, of which your Lordships are bound to take notice, it is no objection to the relevancy of the summons to state, that they are imperfectly quoted ; but it is as well to mention, that the act of 1567, cap. 7.

contains the following clause, which is studiously omitted in the summons :—“ Providing that in case the patron present ane person qualified to his understanding, and failing of ane, ane other, within the said six months ; and the said superintendent or commissioner of the kirk refuses to receive and admit the person presented be the patron, as said is, it sall be leisome to the patron to appeal to the superintendent and ministers of that province where the benefice lies, and desire the person presented to be admitted, whilk gif they refuse, to appeal to the General Assembly of this hail realme, be whom, the cause being decided, sall take end, as they decern and declare.”

In like manner, the pursuers have omitted to state, that although, until lately patrons had the administration of vacant stipends, they were bound to apply them to pious uses within the parish, at the sight of the heritors ; and that, by the statute 54th Geo. III. cap. 169 (local and personal acts,) it is enacted, “ That when any parish in the Church of Scotland becomes vacant by the death, translation, or deprivation of any incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend thereby arises, subsequent to the crop and year 1813, such vacant stipend, in so far as it has heretofore been applicable by the patrons to pious purposes, shall henceforth, and in all time to come, be levied in manner herein after mentioned, and paid to the said general collector (of the Widows’ Fund,) who is hereby authorised to levy and discharge the same,” &c.

A more serious objection to the summons is the imperfection of its narrative, with regard to the proceedings in the church courts, which would lead the Court to infer that the pursuers have neglected to avail themselves of their right of appeal to the superior church judicatories ; and that they have brought their case into this Court before exhausting all the natural and legal remedies provided for them by the Legislature, and particularly those pointed out in the passage which the defenders have quoted from the Act of Parliament 1567. This, however, must have arisen from mere oversight ; and it seems sufficient to say, that the pursuers appealed from the sentence of 2d December 1834, first to the Synod of Perth and Stirling, and second to the General Assembly ; by both of which courts the sentence of the Presbytery was affirmed ; by the former on 21st April 1835, and by the latter on 30th May 1835 ; the judgment on which occasion is expressed in the following minute : “ *At Edinburgh, Saturday, the 30th day of May 1835, Session 10.*—Which day the General Assembly of the Church of Scotland had transmitted to them by their Committee of Bills, petition of Mr Robert Young, presentee to the church and parish of Auchterarder, against four sentences of the Synod of Perth and Stirling, of the 21st April 1835 ; the first refusing extracts in his case, under a reference from the Presbytery of Auchterarder ; the second affirming the judgment of the Presbytery of Auchterarder, of the 2d day of December 1834, repelling objections to the roll of male heads of families, communicants in the parish of Auchterarder ; the third affirming a judgment of the Presbytery of Auchterarder, of the 2d day of December 1834, resolving to pro-

“ceed in the face of the above appeals; and the fourth affirming a judgment of Presbytery of same date, finding that dissents had been lodged by an apparent majority of persons upon the roll.” Then, after mentioning the *partibus*, or compareance of parties, it proceeds, “It was moved and seconded, that the General Assembly sustain the appeal, reverse the sentence of the Presbytery of Auchterarder, in so far as the Presbytery refused to proceed with the trial and settlement of the appellant, as presentee of the parish of Auchterarder, there being no special objections against him, or dissents by a majority of the male heads of families, according to the roll made up in the manner prescribed by the regulations enacted by the last General Assembly, and remit to the Presbytery of Auchterarder to proceed with the trial and settlement of the appellant, according to the rules of the Church. Another motion was made and seconded, That the General Assembly find that the Synod did wrong in finding that the appellant had not a right to the extracts referred to, and so far sustain the appeal, and reverse the sentence in that matter; but, in respect that the Presbytery, while they referred the question as to the right of the appellant to require such extracts, did authorise their clerk to give the extract which was afterwards produced to the Synod, and that the said extract was on the table of the Synod and was read, as the minutes bear, and that a copy of that extract has been laid before the Assembly by the appellant, find that the said sentence forms no bar to the Assembly now giving judgment on the merits of the cause; and, on the merits, dismiss the appeal, and find that the proceedings of the Presbytery are not liable to any valid objection; and remit to the presbytery to proceed farther in the matter, in terms of the interim Acts of last Assembly. The vote having been called for, it was agreed that the state of the vote should be first or second motion; and the roll being called, and votes marked, it carried second motion by 131 to 95.”

It was in consequence of, and in obedience to, this decision of the General Assembly, that the defenders did, on the 7th day of July 1835, as libelled in the summons, “Reject the pursuer Mr Robert Young, the presentee to Auchterarder, so far as regards the particular presentation now on this table, and the occasion of this vacancy in the parish of Auchterarder.”

Having thus stated so much of the circumstances or details of this case, as are necessary to its distinct apprehension, your Lordships will perceive that the pursuers do tacitly, but very completely and effectually, acknowledge the perfect independence of the Ecclesiastical Courts upon your Lordships, or any other civil judicature; for although they narrate that the judgment of the Presbytery “is illegal and unwarrantable, in so far as, though duly qualified as a licentiate of the Church of Scotland, and in all other respects, to be admitted and received as minister of the church and parish of Auchterarder, in terms of law, and of the deed of presentation foresaid, the said Presbytery refused, and contumaciously continue to refuse, to take the said Robert Young, pursuer, upon trials,” &c.; and although they subsume, that they have often desired and required the said

Presbytery “to discharge their duty, in terms of law and of the statute before libelled, by proceeding in the trials, admission, and final settlement, of the pursuer, the said Robert Young, as minister of the church and parish of Auchterarder;” they do not venture to deduce any conclusion that the pursuer has been effectually admitted minister of the church and parish of Auchterarder, and is entitled to exercise the spiritual functions attached to the office of minister; or that the Presbytery should be ordained to take him upon trial, to find him qualified, and to induct him into the said office. If this had been the nature of the pursuers’ conclusions, it would have raised a very important, but by no means a difficult question, as to the independence of the Church of Scotland in the matter of induction and ordination, as the only means of forming the spiritual relation between a pastor and his people; and it might have been the duty of the Presbytery, not only to themselves, and to their order, but to your Lordships, as a court necessarily and unquestionably acquainted with the exact limits of your own powers and jurisdiction, to have abstained from entering into any of the details which they have now deemed it expedient to give, and to have respectfully declined your Lordships’ jurisdiction in the matter.

The course followed by the pursuers, however, has happily saved the defenders from the necessity of resorting to any such objection; for although nothing else could have been expected from the terms of the narrative, and the subsumption, than that they were to proceed to conclusions of the nature of those now suggested, the pursuers have restricted themselves to certain conclusions of another sort, and to which it is not meant to be maintained that your Lordships are not competent. These conclusions, as your Lordships have perceived, result into this; *First*, That the pursuer Mr Young was legally, validly, and effectually presented: *Second*, That the defenders, and Dr Grant for the Widows’ Fund, should be prohibited from molesting him or Lord Kinnoull in the enjoyment of the stipend, glebe, &c.: And *third*, That he or Lord Kinnoull were entitled to the same, and that the heritors should be ordained to make payment to one or other of them accordingly.

With regard to the first of these conclusions, if the defenders understand what it means, their answer is,—that they have admitted that Mr Young was legally presented to the parish and church of Auchterarder, in so far as they first received and afterwards sustained his presentation. But if any different meaning is couched under the words “validly and effectually,” they call on the pursuers to explain what it is; and at present shall only protest that, if they mean that Mr Young did, in virtue of his presentation, acquire the full character, *status*, and rights, of the ordained minister of the church and parish of Auchterarder, they express what is utterly contrary to law, and what cannot for a moment be listened to by your Lordships. But this cannot have been the intention of the pursuers; and in so far as concerns this first conclusion, it is enough to say, that if, as will be seen immediately, it leads to nothing else than that there was a good presentation, the defenders should not have been put to the trouble,

inconvenience, and expense, of coming into Court, to hear a point declared which they had not only not denied, but which they had distinctly assumed and acted upon.

With regard to the second conclusion, it ought not to have been directed against the defenders. It is settled law, that no man has a right to the temporalities of a benefice, till he has been ordained and inducted by the Ecclesiastical Court. But your Lordships cannot compel, and you are not asked to compel, the defenders to ordain or induct the present pursuer. It is also settled law, that all vacant stipends shall be paid to the collector of the Widows' Fund ; and that the manse and glebe belong to the heritors, and not the patron, during a vacancy ; and both these parties well know how to assert their own rights. And, lastly, if any thing is clearer than another, it is, that Presbyteries never had, and have not now, any right to vacant stipends. The defenders never pretended that they had any such right, nor have they done any thing indicating any intention of making such a claim, or any conception that they were entitled to do so. With regard to this conclusion also, therefore, it is submitted, that it ought not to have been levelled against the present defenders.

With regard to the third conclusion, it is directed solely against the heritors, and it would be improper for the Presbytery to take their defence out of their own hands.

The defenders ought therefore to be assoilzied with expenses.

PLEA IN LAW.—The whole conclusions of the summons are inapplicable to the case of a Presbytery which has not asserted any right of presentation *jure devoluto*, nor any claim for themselves or others to any part of the benefice or temporalities of the church or parish. Under protestation to add and eik,—Ro. BELL.

III. REVISED CONDESCENDENCE FOR THE RIGHT HONOURABLE THE EARL OF KINNOULL, &c.—*Pursuers* ; AND REVISED ANSWERS FOR THE PRESBYTERY OF AUCHTERARDER, *Defenders*.

Cond. 1. That the church and parish of Auchterarder became vacant by the death of the Rev. Charles Stewart, on 31st August 1834.

Ans. 1. Admitted.

Cond. 2. That the pursuer, the Earl of Kinnoull, is, and was, at the date of the said vacancy, the undoubted patron of the said church and parish, and that the pursuer, the Rev. Robert Young, was then a duly qualified licentiate of the Church of Scotland.

Ans. 2. Admitted.

Cond. 3. That at a meeting of the Presbytery of Auchterarder, which was held at Trinity Gask on the 14th of October 1834, Mr Robert Hope Moncrieff, writer in Perth, on the part of the Earl of Kinnoull, laid on the table of the Presbytery a presentation by his Lordship, as patron of the church and parish of Auchterarder, in favour of the other pursuer, the Rev. Robert Young, dated the 16th day of September 1834, whereby his Lordship nominated and appointed the said Rev. Robert Young, to be minister of the said church and

parish during all the days of his life ; and gave, granted, and disposed to him, the constant localled and modified stipend, with the manse and glebe, and other profits and emoluments pertaining and belonging to the said church and parish, and that for crop and year 1835, and thereafter during the lifetime of the said Robert Young, and his serving the cure of the said church and parish, and requiring the Rev. the Moderator and Presbytery of Auchterarder, to take trial of the qualification, literature, good life, and conversation, of the said Robert Young, pursuer ; and after having found him fit and qualified for the functions of the ministry in the church and parish of Auchterarder, to admit and receive him thereto, by ordaining and admitting him, in due and competent form, accordingly ; all conform to the deed of presentation itself.

Ans. 3. Admitted.

Cond. 4. That along with the deed of presentation, there were produced to the Presbytery, by the said Robert Hope Moncrieff, a certificate, that the Earl of Kinnoull had, as patron, qualified himself to exercise his right of patronage, by taking the requisite oaths to Government : A letter of acceptance by the pursuer, the Rev. Robert Young, of the presentation in his favour to the church and parish of Auchterarder ; a certificate of his having qualified himself to accept of and hold the said presentation, by taking the usual oaths to Government ; also the usual parochial certificate, and a certificate signed by five ministers of the Presbytery of Dundee, that the pursuer, the Rev. Robert Young, was a duly qualified licentiate of the Church of Scotland, having received his license from the said Presbytery. There was likewise produced an engagement to exhibit an extract of the pursuer's license as soon as a meeting of the Presbytery of Dundee should be held. The deed of presentation, and relative papers, having been read, they were appointed to lie on the table till next meeting of Presbytery.

Ans. 4. Admitted.

Cond. 5. That at a meeting of the Presbytery, which was held at Auchterarder on the 27th of October 1834, Mr Robert Hope Moncrieff, on the part of the Earl of Kinnoull, produced an extract of the license of the pursuer, the Rev. Robert Young, as a preacher of the Gospel, and testimonial in his favour by the Presbytery of Dundee, which having been read, and the Presbytery " considering that all the " documents usually given in in cases of this kind, have already been " laid on the table, along with the presentation by the Earl of Kinnoull, to Mr Robert Young, preacher of the Gospel, to be minister " of the church and parish of Auchterarder," did so far sustain the presentation, as to find themselves prepared to appoint a day for moderating in a call to the pursuer ; and, accordingly, they appointed one of their number to preach in the church of Auchterarder on Sunday then next, being the 2d of November, and to intimate that the presentee would preach in the church of Auchterarder on Sunday the 16th, and again on Sunday the 23d of the same month. Intimation was likewise directed to be made, that the Presbytery would meet in the church of Auchterarder on Tuesday the 2d of December, to moderate in a call, in the usual way, to the pursuer, the Rev. Robert

Young, to be minister of that parish. In the foresaid deliverance of the Presbytery of Auchterarder, Mr Hope Moncrieff, on the part of the Earl of Kinnoull, acquiesced, and took instruments in the clerk's hands; but in so far as the deliverance at all sustained the presentation, Messrs Mackenzie and Walker, (ministers of the parishes of Comrie and Muthil,) dissented, on the ground, that by so doing the Presbytery did seem to homologate and approve of patronage, all as the minutes themselves bear.

Ans. 5. Admitted only in so far as consistent with the minutes of Presbytery, which are hereby referred to.

Cond. 6. That at the meeting of the Presbytery, which was held at Auchterarder on the 2d of December 1834, for the purpose of moderating in a Call to the pursuer, there was produced and read a Call subscribed in his favour, to be minister of the said church and parish. Whereupon the Presbytery afforded an opportunity to the heads of families, members of the congregation, and in communion with the church, by themselves, or by an agent duly authorized, to state any special objections to the settlement of the pursuer, of whatever nature such objections might be; but no objections were stated by any one to the settlement of the pursuer, the Rev. Robert Young, as minister of the church and parish of Auchterarder.

Ans. 6. Admitted with reference to the minutes of Presbytery, and with the addition that the Call was only signed by the factor for the patron, and two heads of families.

Cond. 7. That at the said meeting the Presbytery then proceeded to afford an opportunity to the male-heads of families, whose names were alleged to stand on a roll, "to give in dissents on the Call and settlement of Mr Robert Young as minister of the parish;" and this the Presbytery did, notwithstanding a protest duly taken on the part of the pursuer, the Rev. Robert Young, by Mr Archibald Reid, writer in Perth, his agent, against the legality of the said proceeding; and the Presbytery afterwards, by their sentence and deliverance, found that "dissents have been lodged by an apparent majority of the persons on the roll inspected by the Presbytery," and they adjourned consideration of the proceedings until their next meeting, which was appointed to be held at Auchterarder on the 16th of December 1834; against all which proceedings a protest was entered on the part of the pursuer, the Rev. Robert Young.

Ans. 7. Denied, in so far as the protest was not against the legality of the proceeding simply, but only against the roll of heads of families as made up.

Cond. 8. That at another meeting of the Presbytery, which was held at Auchterarder on 16th December 1834, in respect that none of the persons who had dissented from the settlement of the pursuer appeared to withdraw their dissents, the Presbytery again found, "that there is a majority of the persons on the roll still dissenting."

Ans. 8. Admitted, with reference to the minutes of Presbytery.

Cond. 9. That at a meeting of the Presbytery, which was held at Auchterarder on the 7th of July 1835, the Presbytery, by their deliverance and sentence, did "reject the pursuer, Mr Robert Young, the presentee to Auchterarder, so far as regards the particular presen-

"tation now on their table, and the occasion of this vacancy in the
 "parish of Auchterarder, and do forthwith direct their clerk to give
 "notice of this, their determination, to the patron, the presentee, and
 "the elders of Auchterarder."

Ans. 9. Admitted.

Cond. 10. That the pursuer, the Rev. Robert Young, was duly qualified as a Licentiate of the Church of Scotland, and as holding a valid and effectual presentation to the church and parish of Auchterarder, as well as in all other respects, to be admitted and received minister of the said church and parish. And though no special objections were stated against his qualification or settlement, the Presbytery did not take the pursuer upon trials, and pronounce judgment on his qualifications as presentee foresaid; but refused, and still refuse to do so, and to admit and receive him as minister of the said church and parish.

Ans. 10. Not Admitted.

Cond. 11. That the foresaid sentence, whereby the Presbytery rejected the Rev. Robert Young, pursuer, as presentee to the church and parish of Auchterarder, proceeded exclusively on the ground of the veto on dissents exercised by the alleged majority of heads of families, or parishioners of Auchterarder.

Ans. 11. Admitted.

STATEMENT OF FACTS for the PRESBYTERY OF AUCHTERARDER, Defenders, and PURSUERS' ANSWERS thereto.

Stat. 1. The church and parish of Auchterarder became vacant on the 31st August 1834, by the death of Mr Stewart, the late minister there.

Ans. 1. Admitted.

Stat. 2. The pursuer, the Earl of Kinnoull, as patron of the parish, being duly qualified to do so, executed a deed of nomination and presentation of the said parish in favour of the other pursuer, Mr Young, on the 16th September 1834.

Ans. 2. Admitted.

Stat. 3. This presentation, together with the usual citation and necessary documents, were laid upon the table of the Presbytery, on the 14th day of October 1834, by Robert Hope Moncrieff, writer in Perth, who appeared as agent and as representing the patron on the occasion. All which documents were, by a deliverance of the Presbytery of the same date, appointed to lie on the table in common form.

Ans. 3. Admitted.

Stat. 4. On 27th October 1834, the Presbytery of Auchterarder met, and the minutes bear *inter alia*, "Robert Hope Moncrieff, Esq., writer in Perth, as agent for the Earl of Kinnoull, gave in, "in addition to the papers lodged by him at last meeting, an extract "of a license, and testimonial in favour of Mr Robert Young, preacher of the Gospel, by the Presbytery of Dundee, which was read. "The Presbytery, taking into consideration, that the late Rev. Charles "Stewart, minister of Auchterarder, died on the 31st of August last, "and that the 23d regulation of the interim act of the late General

“ Assembly anent calls, intimates, that all cases in which the vacancies have taken place after the rising of the said Assembly, shall fall under the operation of the regulations, and relative act of the Assembly anent calls, Find, therefore, that they must proceed to fill up the vacancy in Auchterarder, according to said act and relative regulations.” Copies of this act of “ Assembly, and the relative regulations, are herewith produced and referred to.”

Ans. 4. The partial quotation from the minutes made in this article, is believed to be correct, but the minutes themselves are referred to for their terms. In all other respects denied.

Stat. 5. The Presbytery also “ considering that all the documents usually given in, in cases of this kind, have already been laid on the table along with the presentation by the Earl of Kinnoull, to Mr Robert Young, preacher of the Gospel, to be the minister of the Church and parish of Auchterarder, did, in pursuance of the first regulation of the act of Assembly anent Calls, in so far sustain the presentation, as to find themselves prepared to appoint a day for moderating in a call to Mr Young;” and to this finding also no objection was stated by Mr Moncrieff, nor by any other person on the part of Mr Young or the Earl of Kinnoull.

Ans. 5. The partial quotation from the minutes made in this article, is believed to be correct; but the minutes themselves are referred to for their terms. In all other respects denied.

Stat. 6. The Presbytery further proceeded, in terms of their findings, to fix the days for Mr Young to preach, and to appoint a time for moderating in a call in his favour. “ In all which sentences of the Presbytery, Mr Moncrieff acquiesced, and took instruments in the clerk’s hands.”

“ From which sentence of the Presbytery, in so far as it at all sustained the presentation, Messrs Mackenzie and Walker dissented on the ground, that by so doing, the Presbytery did seem to homologue and approve of patronage.”

Ans. 6. The partial quotation from the minutes made in this article, is believed to be correct; but the minutes themselves are referred to for their terms. In all other respects denied.

Stat. 7. On 2d December 1834, the Presbytery proceeded to moderate in a call as had been resolved, and Mr Lorimer then signed it for the Earl of Kinnoull as patron, being his factor; and the call was further signed by Michael Tod and Peter Clark, heads of families.

“ The Presbytery then proceeded, in terms of the 3d regulation of the interim act of the last General Assembly anent Calls, to give an opportunity to the male heads of families, being members of the congregation, and in full communion with the church, whose names stand on the roll which has been inspected by the Presbytery, to give in special objections or dissents, when no special objections were given in.” To this part of the proceeding no objection whatever was stated.

Ans. 7. Admitted that the call in favour of Mr Young, the pursuer, was laid on the table of the Presbytery. That the minutes are

believed to contain the passages here extracted, but under reference to the minutes themselves for their terms. In other respects denied.

Stat. 8. A mandate from Mr Robert Young, presentee to the parish of Auchterarder, to Archibald Reid, Esq. writer in Perth, was then given in, "authorizing him to appear as his agent in this case ; " which mandate having been read, was sustained. Compeared William Thomson, Session-Clerk of Auchterarder, and being asked, "produced a roll of male heads of families in the parish of Auchterarder, in terms of the regulations of the act of last General Assembly anent Calls."

"At this stage Mr Reid was heard, and objected to the Presbytery either receiving or acting upon said roll, inasmuch as the same was not made up either within the time or in the manner prescribed by act of Assembly." But no objection was stated that the Presbytery were not entitled to proceed according to the act of Assembly.

Ans. 8. Admitted, that the call in favour of Mr Young, the pursuer, was laid on the table of the Presbytery. That the minutes are believed to contain the passages here extracted, but under reference to the minutes themselves for their terms. In other respects denied.

Stat. 9. The Presbytery felt "themselves obliged to repel said objection, they having already sanctioned the roll as given in by the Kirk-Session, and as containing a correct list of male heads of families in communion with the church, within the two months after the rising of the Assembly, and after the last dispensation of the Lord's Supper in the parish, against which sentence Mr Reid protested and appealed to the next meeting of the Synod of Perth and Stirling, for reasons to be given in in due time ; took instruments in the clerk's hands, and craved extracts, not only of the proceedings of this day, but of all former proceedings of the Presbytery, in reference to the vacancy and settlement of this parish, and also certified copies of said roll, and of all other documents produced to the Presbytery, either on this day or at former meetings, in reference to the case, in so far as the same are not engrossed in the minutes. The Presbytery agree to give the proper extracts and papers relating to their proceedings in this case to Mr Reid, but enjoin their clerk to give none till their next meeting, the minutes of this day's proceedings not being yet extended."

Ans. 9. Admitted, that the call in favour of Mr Young, the pursuer, was laid on the table of the Presbytery. That the minutes are believed to contain the passages here extracted, but under reference to the minutes themselves for their terms. In other respects denied.

Stat. 10. The Presbytery then "proceeded to afford an opportunity to the male heads of families, whose names stand upon the roll, to give in dissents from the call and settlement of Mr Robert Young, as minister of the parish. The Presbytery found in terms of the ninth regulation, that dissents have been lodged by an apparent majority of the persons on the roll inspected by the Presbytery ; adjourn the proceedings in this case to their next meeting, to be held at Auchterarder on Tuesday the 16th curt.; against which sentence of the Presbytery Mr Reid, on the part of Mr Young, without prejudice to his former appeals, protested, and appealed to the en-

“ suing meeting of the Synod of Perth and Stirling, for reasons to be
 “ given in in due time.”

Ans. 10. The quotation from the minutes is believed to be correct :
 but the minutes themselves are referred to for their terms.

Stat. 11. At a meeting held at Auchterarder on 16th December
 1834, “ the Presbytery proceeded, in terms of the twelfth regulation
 “ of the act of Assembly anent Calls, to ascertain whether or not the
 “ major part of the persons on the roll of male heads of families in the
 “ parish of Auchterarder, inspected by the Presbytery, entitled to dis-
 “ sent, who dissented against the settlement of Mr Young, do still ad-
 “ here to their dissents, when, on the question being asked by the mo-
 “ derator, none appeared to withdraw their dissents.” The Presby-
 tery at the same time found, in terms of the said regulation, that there
 is a majority of the persons on the roll still dissenting.

Ans. 11. The quotation from the minutes is believed to be correct :
 but the minutes themselves are referred to for their terms.

Stat. 12. “ The Presbytery then proceeded, in the terms of the thir-
 “ teenth regulation, to give an opportunity to the patron, presentee,
 “ or any member of Presbytery, to require all, or any of the persons
 “ dissenting, to appear before the Presbytery at a meeting to be held
 “ in terms of said regulation, to declare, in terms of the resolution of
 “ the General Assembly, when, on the question being asked by their
 “ moderator, no such requirement was made. The Presbytery there-
 “ fore adhere to the above finding, that a majority of the persons on
 “ the roll still dissent ;” and after some farther procedure, and upon
 account of three appeals having been taken against the proceedings at
 their last meeting to the Synod, “ the Presbytery sist procedure in
 “ this case, until they learn how these appeals are disposed of.”

Ans. 12. Admitted, under reference to the minutes themselves.

Stat. 13. On 21st April 1835, the Synod of Perth and Stirling, “ did,
 “ and hereby do, dismiss the appeals. Find that the Presbytery of
 “ Auchterarder acted agreeably to the spirit of the interim act, in giv-
 “ ing their attestation to the roll made up by Kirk-Session of Auchter-
 “ arder, and which had been attested by their appointment, and did,
 “ and hereby do, remit to the Presbytery to proceed agreeably to the
 “ interim act of the Assembly.”

Ans. 13. Admitted.

Stat. 14. This judgment was brought before the General Assembly
 of 1835, which, by its judgment of 30th May 1835, dismissed the ap-
 peals, and remitted to the Presbytery to proceed farther in the matter,
in terms of the interim act of last Assembly.

Ans. 14. Admitted.

Stat. 15. On 7th July 1835, the Presbytery did reject the pursuer,
 Mr Robert Young, the presentee to Auchterarder, so far as regards
 the particular presentation now on their table, and the occasion of this
 vacancy in the parish of Auchterarder, and do forthwith direct their
 clerk to give notice of this their determination to the patron, the pre-
 sentee, and the elders of Auchterarder.

Ans. 15. Admitted, under reference to the minutes of Presbytery
 for their terms.

Stat. 16. No appeal or complaint against this judgment was ever brought before either the Synod or the General Assembly.

Ans. 16. Admitted.

PLEAS IN LAW FOR THE PURSUERS.—I. The judgments of the defenders, the Presbytery of Auchterarder, of 2d December 1834, and 7th July 1835, and the rejection of the pursuer, Mr Young, as presentee to the church and parish of Auchterarder, were *ultra vires* of the Presbytery, and in violation of the legal rights of the pursuers as established by law, and the statutes libelled.

II. More particularly, it was *ultra vires* of the Presbytery, and in violation of the rights of the pursuers, as patron and presentee, as well as a dereliction of the duty devolved by law on the Presbytery, to delegate to third parties the trial and judgment of the qualification of the pursuer, Mr Young, as presentee.

III. As no objections were stated to the qualifications of the pursuer, Mr Young, as presentee, the Presbytery were, in terms of the statutes libelled, bound and astricted to have, themselves, taken him upon trials, and to have given judgment on his qualifications, and to have either rejected him as not qualified, or to have admitted and received him as minister of the church and parish of Auchterarder.

IV. That, according to the statutes of the kingdom of Scotland, and to the treaty of Union of the kingdoms of Scotland and England, and the relative act of the Scottish Parliament, for securing the Presbyterian government of the church, the power and duty of judging of the qualifications of preachers and presentees, and of collation to benefices, are vested in the Presbytery of the bounds, and other Church Courts; and that it is illegal, and unconstitutional, and contrary to the laws establishing the Church of Scotland as the National Church, for Presbyteries to refuse to exercise that power and duty, or to denude of the power and duty of collation, or to submit the qualifications of the preachers and presentees to an arbitrary power of rejection by any portion of the parishioners or hearers.

V. That a veto on the patron's right of patronage and presentation by the parishioners or communicants; that is, an arbitrary rejection by them of a presentee, duly qualified according to the forms and trials of the Church, and licensed as a preacher of the Gospel, without any trial by the Church Courts, and without any cause assigned, is illegal, unconstitutional, and incompetent, and inconsistent with the undoubted rights of the patron, as established by law, with the rights of preachers of the church, of the presentee who has received a presentation, and with the powers, duties, and privileges of the Church Courts.

VI. As the Presbytery and the individual members thereof, in the several matters condescended on and complained of, exceeded the powers conferred on them by law, and acted illegally, and in violation of their duty, and that to the prejudice and serious injury of the patrimonial rights of the pursuers respectively, the pursuers are entitled to decree in terms of the conclusion of the summons.—In respect whereof, &c. (Signed) ROBT. WHIGHAM.

PLEAS IN LAW FOR THE PRESBYTERY OF AUCHTERARDER,—*Defenders*.—I. By the laws of the Church of Scotland, which are also sanctioned by those of the State, all matters relating to the trial and induction of ministers, are subject to the jurisdiction of the Church Courts, whose sentences are final and conclusive.

II. Separately—The pursuers would have been barred from bringing the judgment of the Presbytery under the adjudication of this Court, even if it had been otherwise competent, in consequence of having failed to follow out the course of appeal and redress provided by the rules of the Church.

III. It is not competent to conclude against a Presbytery either as to the right to, or the payment of stipend, or the possession of the manse and glebe.

IV. The pursuers have no interest to entitle them to maintain any of the other conclusions of the summons.—In respect whereof, &c.
(Signed) RO. BELL.

No. III.

MINUTES OF THE PRESBYTERY OF AUCHTERARDER,
AND OF THE SYNOD OF PERTH AND STIRLING.

N. B.—The Proceedings of the General Assembly will be found in the Minute of Presbytery of 7th July 1835, p. 31.

MINUTES OF PRESBYTERY.

AT Trinity Gask, the 14th day of October 1834, the which day the Presbytery of Auchterarder met, and was constituted (*inter alia.*)—There was laid upon the Presbytery table, by Robert Hope Moncrieff, Esq. writer in Perth, a presentation from the Earl of Kinnoull, in favour of Mr Robert Young, preacher of the Gospel, to the church and parish of Auchterarder, vacant by the death of the Rev. Charles Stewart, together with the patron's certificate of having qualified to Government, Mr Young's letter of acceptance of said presentation, certificate of having qualified to Government, parochial certificate, and a certificate signed by five ministers of Dundee, that Mr Young was a licentiate of that Presbytery, with an engagement to produce an extract of license as soon as there is a meeting of the Presbytery of Dundee. All which documents having been read, the Presbytery agreed to allow them to lie on their table till next meeting.

The sederunt was closed with prayer.

AT Auchterarder, the 27th day of October 1834, the which day the Presbytery of Auchterarder met, and was constituted (*inter alia.*)—Robert Hope Moncrieff, Esq. writer in Perth, as agent for the Earl of Kinnoull, gave in, in addition to the papers lodged by him at last meeting, an extract of license, and testimonial in favour of Mr Robert Young, preacher of the Gospel, by the Presbytery of Dundee, which was read.

The Presbytery taking into consideration that the late Rev. Charles Stewart, minister of Auchterarder, died on the 31st of August last, and that the twenty-third regulation of the interim act of the late General Assembly anent calls, intimates that all cases in which the vacancies have taken place after the rising of said Assembly, shall fall under the operation of the regulations and relative act of Assembly anent calls; finds, therefore, that they must proceed to fill up the vacancy in Auchterarder, according to said act and relative regulations. The Presbytery also considering, that all the documents usually given in in cases of this kind have already been laid on the table, along with the Presentation by the Earl of Kinnoull to Mr Robert Young, preacher of the Gospel, to be minister of the church and parish of Auchterarder, did, in pursuance of the first regulation of the act of Assembly anent calls, in so far sustain the presentation as to find themselves prepared to appoint a day for moderating in a call to Mr Young. They accordingly did, and hereby do, appoint the Rev. John Clark, one of their number, to preach in the church of Auchterarder on Sabbath

next, being the 2d day of November, and to intimate from the pulpit, that the Rev. Robert Young, presentee to the parish of Auchterarder, will preach in the church of Auchterarder on Sabbath the 16th day of November; and the Presbytery, on consideration, deeming it expedient that he should preach oftener than once before the moderation of his call, appoint Mr Clark at the same time to intimate, that Mr Young will preach there on the 23d of the same month. The Presbytery further appoint Mr Clark to intimate, that the Presbytery of Auchterarder will meet in the church of Auchterarder on the 1st Tuesday of December next, being the 2d day of that month, to moderate in a call in the usual way to Mr Young, to be minister of that parish; the moderator to preach and preside. In all which sentence of the presbytery Mr Moncrieff acquiesced, and took instruments in the clerk's hands. From which sentence of the Presbytery, in so far as it at all sustained the presentation, Messrs M'Kenzie and Walker dissented, on the ground, that by so doing, the Presbytery did seem to homologate and approve of patronage.

The sederunt was closed with prayer.

At Auchterarder, the 2d day of December 1834, the which day the Presbytery of Auchterarder met, and was constituted (*inter alia*.) — Mr Clark reported, that in obedience to the injunction of Presbytery, he had preached at Auchterarder on the 2d of November, and had given due intimation that the Presbytery, at their meeting here this day, would moderate in a call to Mr Young, to be minister of the parish of Auchterarder. Mr Morrison, elder for Auchterarder, reported that Mr Young had preached here on the two days appointed by the Presbytery; and the clerk reported that he had written to the non-resident heritors, apprising them that the presbytery were, at their meeting here this day, to moderate in a call to Mr Young. The Presbytery then proceeded to the church, when, after sermon by their moderator, from Mark, 12th chap. 10th and 11th verses, there was produced and read a call to Mr Robert Young, to be minister of the church and parish of Auchterarder; and an opportunity was given to the heritors, elders, heads of families, and other parishioners, to sign it. Mr Lorimer then signed for the Earl of Kinnoull, as patron, being his factor; and the call was further signed by Michael Tod and Peter Clark, heads of families.

The Presbytery then proceeded, in terms of the third regulation of the interim act of the last Assembly anent calls, to give an opportunity to the male-heads of families, being members of the congregation, and in full communion with the church, whose names stand in the roll which has been inspected by the Presbytery, to give in special objections or dissents, when no special objections were given in.

A mandate from Mr Robert Young, presentee to the parish of Auchterarder, to Archibald Reid, Esq. writer in Perth, was given in authorizing him to appear as his agent in this case; which mandate having been read was sustained. Compared William Thomson, session-clerk of Auchterarder, and being asked, produced a roll of male-heads of families in the parish of Auchterarder, in terms of the regulations of the act of last Assembly anent calls. At this stage Mr Reid was heard, and objected to the Presbytery either receiving or acting

upon said roll, inasmuch as the same was not made up either within the time, or in the manner prescribed by act of Assembly. The Presbytery feel themselves obliged to repel said objection, they having already sanctioned the roll as given in by the kirk-session, and as containing a correct list of male-heads of families in communion with the Church within the two months after the rising of the Assembly, and after the last dispensation of the Lord's Supper in the parish. Against which sentence Mr Reid protested, and appealed to the next meeting of the Synod of Perth and Stirling, for reasons to be given in due time, took instruments in the clerk's hands, and craved extracts, not only of the proceedings of this day, but of all former proceedings of the Presbytery in reference to the vacancy and settlement of this parish; and also certified copies of the said roll, and of all other documents produced to the Presbytery, either on this day, or at former meetings, in reference to the case, in so far as the same are not engrossed in the minutes.

The Presbytery agree to give the proper extracts and papers relating to their procedure in this case to Mr Reid; but enjoin their clerk to give none till their next meeting, the minutes of this day's proceedings not being yet extended. It was then moved and seconded, that the Presbytery do now proceed in this case, in terms of the regulations of the interim act of last Assembly anent calls. It was also moved and seconded, that an appeal having been taken against the decision of the Presbytery, over-ruling the objection taken respecting the roll, the Presbytery sist procedure till that appeal be disposed of. After some discussion, the mover and seconder of the second motion, with the leave of the Court, withdrew it, upon the understanding that they are not to be held as approving of the first motion. The Presbytery then, in accordance with the first motion, agreed to proceed in this case in terms of the regulations of the act of Assembly. Against which sentence Mr Reid protested, and appealed to the next meeting of the Synod of Perth and Stirling, for reasons to be given in due time, took instruments in the clerk's hands, and craved extracts.

In conformity with the regulations of the act of Assembly, the Presbytery then proceeded to afford an opportunity to the male-heads of families, whose names stand upon the roll, to give in dissents from the Call and settlement of Mr Robert Young as minister of the parish.

The following heads of families, whose names stand on the roll, did then appear before the Presbytery, and did personally deliver their dissent, or disapproval of the presentee, and their names were taken down by the clerk of Presbytery; viz:—(*Here follow the names.*)

The Presbytery found, in terms of the ninth regulation, that dissents have been lodged by an apparent majority of the persons on the roll inspected by the Presbytery. The Presbytery did then, in terms of the ninth regulation, adjourn the proceedings in this case to their next meeting, to be held at Auchterarder on Tuesday the 16th current. Against which sentence of the Presbytery Mr Reid, on the part of Mr Young, without prejudice to his former appeals, protested, and appealed to the ensuing meeting of the Synod of Perth and Stirling, for reasons to be given in, in due time, and thereupon took instruments, and craved extracts.

The sederunt was closed with prayer.

At Auchterarder, the 16th day of December 1834, the which day the Presbytery of Auchterarder met, and was constituted, (*inter alia*.) —The clerk and moderator reported that reasons for the three appeals, taken by Mr Reid at the last meeting of Presbytery, had been lodged with them in due time ; which reasons were produced, read, and ordered to be kept *in relentis* ; and the clerk was authorized to give a certified copy of them if required.

The Presbytery then proceeded, in terms of the twelfth regulation of the act of Assembly anent Calls, to ascertain whether or not the major part of the persons on the roll, of male heads of families, in the parish of Auchterarder, inspected by the Presbytery, entitled to dissent, who dissented against the settlement of Mr Young, do still adhere to their dissents ; when, on the question being asked by their moderator, none appeared to withdraw their dissents. The Presbytery at the same time found, in terms of said regulation, that there is a majority of the persons on the roll still dissenting.

The Presbytery then proceeded, in terms of the thirteenth regulation, to give an opportunity to the patron, presentee, or any member of Presbytery, to require all, or any of the persons dissenting, to appear before the Presbytery, at a meeting to be held in terms of said regulation, to declare in terms of the resolution of the General Assembly ; when, on the question being asked by their moderator, no such requirement was made. The Presbytery therefore adhere to the above finding, that a majority of the persons on the roll still dissent.

At this stage, Mr M'Kenzie moved, that the Presbytery do take into consideration the Call to Mr Young, presentee to Auchterarder, and do find, that it being signed only by three individuals, and of these only two members of the congregation, that said Call is not a good or sufficient call ; and do declare that no settlement can take place thereupon ; which motion was duly seconded. It was also moved and seconded, that the Presbytery refuse to act in terms of this motion, as being incompetent at this stage of the business. The state of the vote was fixed first or second motion ; when the roll being called, and votes marked, it was carried second motion. Which sentence being intimated, Mr Mackenzie dissented, and protested for leave to complain to the ensuing meeting of the Synod of Perth and Stirling, for reasons to be given in due time, took instruments in the clerk's hands, and craved extracts, which were allowed. Upon account of three appeals having been taken against their proceedings at their last meeting, to the Synod, the Presbytery sist procedure in this case, till they learn how these appeals are disposed of. In which proceeding of the Presbytery, in the case of Auchterarder, Peter Smitton, Esq. of Woodside, John Malcolm, Esq. of Castleknairs, John Mailer, Esq. of Cornhill, Robert Drummond, Esq. of Drummondsfold, Robert Mailer, Esq. portioner, Auchterarder, Mr Craigie, farmer, Strathie Plain, Mr Garvie, farmer, Strathie, Mr Salmond, farmer, Millands, acquiesced, in their own name, and in the name of the dissentients, took instruments in the clerk's hands, and craved extracts, which were allowed.

The Presbytery agreed to give to Mr Reid extracts in full, con-

cerning Mr Young's case, respecting the lodging the presentation, and the consequent proceedings thereon ; but in respect that it appears to them doubtful, as to whether or not he was entitled to an extract of another part of the proceedings of the Presbytery, since the vacancy occurred in this parish, the Presbytery agree to refer that matter to the Synod for decision ; and in the meantime, authorize their clerk to give an extract of the proceedings referred to, that, in the event of the Synod deciding that he was entitled to them, he may have the advantage of having had them previously in his possession ; the same extracts being to be produced or not in the Synod, according to their decision. The Presbytery farther authorize their clerk to give certified copies of the roll and the Call.

The sederunt was closed with prayer.

At Auchterarder, the 7th day of July 1835, the which day the Presbytery of Auchterarder met, and was constituted, (*inter alia.*) The Presbytery agreed to take up the case of Auchterarder, when there compeared for the parishioners dissenting against Mr Young, Peter Smitton, Esq. of Woodside, James Garvie, farmer, Strathie, James Craigie, farmer, Strathie Plain, in name of the dissentients, and produced an extract judgment of the General Assembly, in the case of Auchterarder, craving that the extract be read, and that the Presbytery proceed, in terms of the sentence of the Assembly ; compeared also Archibald Reid, Esq. writer in Perth, for the presentee, in virtue of a mandate formerly given in from Mr Young. The Presbytery then agreed to read the extract, which was done, and is as follows, viz. :—

At Edinburgh, Saturday the 30th day of May 1835 :—Which day the General Assembly of the Church of Scotland, had transmitted to them, by their Committee of Bills, petition of Mr Robert Young, presentee to the church and parish of Auchterarder, against four sentences of the Synod of Perth and Stirling, of the 21st day of April 1835 ; the first refusing extracts in his case, under a reference, from the Presbytery of Auchterarder ; the second, affirming a judgment of the Presbytery of Auchterarder, of the 2d day of December 1834, repelling objections to the rolls of heads of families, communicants in the parish of Auchterarder ; the third affirming a judgment of the Presbytery of Auchterarder, of the 2d day of December 1834, resolving to proceed in face of the above appeals ; and the fourth affirming a judgment of Presbytery, of the same date, finding, that dissents had been lodged by an apparent majority of persons upon the roll. Parties having been called, compeared for the appellant, Thomas Maitland, and George Paton, Esqrs. advocates, as his counsel ; —for the Synod and Presbytery, Mr Cupples, Mr Brydie, Mr Dempster, Mr Walker, Mr McKenzie, Robert Bruce, Esq. of Kennet, elder ; —for the objecting parishioners of the parish of Auchterarder, William Penney, Esq. advocate, as their counsel ;—and Mr Liston, Mr Grierson, Mr Robertson, and Mr Neilson, as complainers against the sentence of the Synod. Parties having been fully heard, were removed. It was moved and seconded, that the General Assembly sustain the appeal, reverse the sentence of the Presbytery of Auchterarder, in so far as the Presbytery refused to proceed with the

trials and settlement of the appellant, as presentee of the parish of Auchterarder, there being no special objection against him, or dissents by a majority of the male-heads of families, according to a roll made up in the manner prescribed by the regulations enacted by the late General Assembly, and remit to the Presbytery of Auchterarder, to proceed with the trial and settlement of the appellant, according to the rules of the Church. Another motion was made and seconded, that the General Assembly find, that the Synod did wrong in finding that the appellant had not a right to any of the extracts referred to, and so far sustain the appeal, and reverse the sentence in that manner. But in respect that the Presbytery, while they referred the question as to the right of the appellant, to require such extracts, did authorize the clerk to give the extract, which was afterwards produced to the Synod, and that the said extract was upon the table of the Synod, and was read, as the minutes bear, and that a copy of that extract has been laid before the Assembly by the appellant; find, that the said sentence forms no bar to the Assembly now giving judgment on the merits of the cause, and on the merits, dismiss the appeal; and find, that the proceedings of the Presbytery are not liable to any valid objections, and remit to the Presbytery to proceed farther in the matter, in terms of the interim act of last Assembly. The vote having been called for, it was agreed that the state of the vote should be first or second motion; and the roll being called, and votes marked, it carried second motion, by 131 to 95. Parties being called in, this judgment was intimated to them; whereupon Mr Penney, for the objecting parishioners, took instruments, and craved extracts. Dr Cook dissented in his own name, and in the name of all who may adhere to him, for reasons to be given in. Extracted from the records of the General Assembly, by (Signed) JOHN LEE, *Cl. Eccl. Scot.*

After consideration, it was moved and seconded, that in conformity with the sentence of the General Assembly 1835, and the interim act of the General Assembly 1834, the Presbytery do now reject Mr Young, the presentee to Auchterarder, so far as regards the particular presentation on their table, and the occasion of this vacancy in the parish of Auchterarder, and do forthwith direct their clerk to give notice of this their determination, to the patron, the presentee, and the elders of the parish of Auchterarder. The Presbytery agreed to this motion, and accordingly did, and hereby do, determine in terms thereof. Which sentence having been intimated, Mr Clark tendered a dissent, bearing to be against this resolution of the Presbytery, and hereby holding himself to be free from all the consequences that may result from the judgment of the Presbytery. The Presbytery refuse to receive this dissent, 1st, because Mr Clark declared, in the presence of the Presbytery, that the decision to which the Presbytery had come, was the only one to which in the circumstances of the case, they ought to have come; and 2^d, because neither he, nor any other member of Presbytery, put any different motion on the record, as the Presbytery conceive ought to have been done, in order to entitle him to enter his dissent constitutionally. Mr Maxton also tendered his dissent, for the above and another reason, because the previous steps en-

joined by the interim act have not, in his opinion, been regularly observed by the Presbytery. The Presbytery refuse this dissent also, for the second reason mentioned above, and also because it is not competent for any member of Presbytery to maintain irregularity on the part of the Presbytery, in regard to any of the previous steps in the case, which were not objected to at the time, and which have moreover been approved of and sanctioned by the General Assembly. The decision of the presbytery in this case was then intimated to the parties. Against which sentence Mr Reid protested, and appealed to the ensuing meeting of Synod of Perth and Stirling, for the following among other reasons,—because the sentence of the Assembly only approves of the proceedings of the Presbytery so far as these were before them, and the last step of the Presbytery previous to the last appeal, was the finding that there was an apparent majority of heads of families against the presentee, and adjourning the proceedings; and the Presbytery is now bound to take up the case at the precise point at which the presentee left them, to follow out his appeals, and should now proceed in the manner required by the 9th and 13th sections of the act and regulations of 1834. And thereupon Mr Reid took instruments, and craved extracts.

Mr Reid then proffered a paper, bearing to be a notarial protest, as agent for Mr Robert Young, against the proceedings of the Presbytery. It was moved, seconded, and agreed to, that the clerk of Presbytery docket this paper as being now proffered, and that the same be kept for the consideration of the Presbytery; which was done. In all which deliverance of the Presbytery, in the case of Auchterarder, Peter Smitton Esq. of Woodside, in his own name, and in the name of the other dissentients, acquiesced, took instruments, and craved extracts, which were allowed.

The sederunt was closed with prayer.

Extracted from the Records of the Presbytery of Auchterarder, on this and the preceding thirty-six pages, by (Signed) JAMES THOMSON, *Presb. Clk.*

II. MINUTES OF SYNOD OF PERTH AND STIRLING.

At Stirling, the 21st day of April 1835 years; Which day the Provincial Synod of Perth and Stirling met, and was constituted, *inter alia*—The Synod proceeded to take up the case from the Presbytery of Auchterarder, respecting the presentation and call to Mr Robert Young, preacher of the Gospel, to the Church and parish of Auchterarder, in which, from the extracts transmitted by the Committee of Bills on the petition of the counsel for the presentee, it appeared that Mr Young is appellant against three judgments of the presbytery, pronounced on the 2d day of December 1834, viz:—

1. Against a judgment of the Presbytery of Auchterarder, pronounced on said day, repelling the objection of the agent for the presentee, to the Presbytery either receiving or acting upon a roll of male-heads of families in the parish of Auchterarder, produced that day; inasmuch as the same was not made up within the time, or in the manner prescribed by Act of Assembly.

2. Against a judgment of the said Presbytery, pronounced on the

same day, resolving to proceed in the settlement of Mr Young, under the regulations of the Assembly 1834, notwithstanding of the previous appeal.

3. Against a judgment of the said Presbytery, pronounced on the same day, finding that dissents had been lodged by an apparent majority of the persons standing on the roll, and therefore adjourning the proceedings to a future day.

The synod having heard the whole proceedings relating to these appeals read, as detailed in the extracts of the minutes of the Presbytery of Auchterarder, and relative papers transmitted, parties were called, when there compeared for the appellant, George Patton, Esq. advocate, with Mr Archibald Reid, agent: For the Presbytery, Messrs Brydie, Walker, Mackenzie, Thomson, and Laird; and Messrs James Garvie and David Taylor, as authorized to appear and act at the Synod, per mandate of date 13th April 1835, before referred to. Parties having being fully heard on the three appeals, were removed.

After reasoning, it was moved and seconded, that the Synod dismiss the appeals; find that the Presbytery of Auchterarder acted agreeably to the spirit of the interim act, in giving their attestation to the roll made up by the Kirk-Session of Auchterarder, and which had been attested by their appointment; and remit to the Presbytery to proceed agreeably to the interim act of Assembly. Another motion was made and seconded, that the Synod sustain the first appeal, and find that the Presbytery did wrong in repelling, without enquiry, the objections offered against the validity and regularity of the roll, the more especially as it appears that the roll was made up after the vacancy: Sustain the 2d and 3d appeals, and find, that the Presbytery acted contrary to the rules of the Church, in proceeding to act upon the roll in the face of an appeal against its validity. And the vote being called for, it was agreed that the state of the vote shall be, first or second motion. The roll being called, and the votes marked, it carried by a large majority, first motion; and therefore the Synod did, and hereby do, dismiss the appeals: Find that the Presbytery of Auchterarder acted agreeably to the spirit of the interim act, in giving their attestation to the roll made up by the Kirk Session of Auchterarder, and which had been attested by their appointment; and did, and hereby do, remit to the Presbytery to proceed, agreeably to the interim act of Assembly.

Parties being called in, and the above deliverance intimated, Mr Patton, for the presentee, protested and appealed against the same to the ensuing meeting of the General Assembly, took instruments and craved extracts.

Mr Liston dissented from said deliverance, and protested for leave to complain to the General Assembly, took instruments and craved extracts; to which dissent and complaint Mr Robertson, Mr Touch, and Mr Grierson adhered.

Mr Mackenzie for the Presbytery, Messrs Garvie and Taylor as mandatories aforesaid, acquiesced in the judgment of the Synod, took instruments and craved extracts.

Extracted from the records of the Synod of Perth and Stirling, on this and the three preceding pages, by (Signed) JO. ED. TOUCH, *Asst. Syn. Clk.*

No. IV.

PRESENTATION BY THE EARL OF KINNOULL IN FAVOUR OF MR
ROBERT YOUNG, TO THE CHURCH OF AUCHTERARDER, 1834.

THE Right Honourable Thomas Robert Drummond Hay, Earl of Kinnoull, undoubted patron of the parish church and parish of Auchterarder, lying within the Presbytery of Auchterarder, and sheriffdom of Perth, *considering*, that the said church and parish is now vacant, and become at my gift and presentation, by and through the death of the Rev. Charles Stewart, late minister of the Gospel at the said church of Auchterarder; and I being sufficiently informed of the literature, loyalty, qualifications, good life and conversation of Mr Robert Young, preacher of the Gospel, residing at Seafield Cottage, Dundee, do therefore, by these presents, nominate and present the said Robert Young to be minister of the said parish and church of Auchterarder, during all the days of his lifetime, giving, granting, and disposing to him the constant located and modified stipend, with the manse and glebe, and other profits and emoluments belonging to the said church, for the crop and year 1835, and during his lifetime, and his serving the cure at the said church, requiring hereby the Reverend Moderator and Presbytery of Auchterarder to take trial of the qualifications, literature, good life and conversation of the said Robert Young; and having found him fit and qualified for the function of the ministry at the said church of Auchterarder, to admit and receive him thereto, and give him his act of ordination and admission, in due and competent form, recommending hereby to the Lords of Council and Session, upon sight of this presentation, and the said Presbytery's act of ordination and admission, to grant letters of horning, on a simple charge of ten days only, and other executorials necessary at the instance of the said Robert Young, against all and sundry the heritors, liferenters, feuars, farmers, tacksmen, tenants, possessors, and occupiers of lands within the said parish, subject and liable in payment of the said located and modified stipend, for causing the said Robert Young, and others in his name, be readily answered and paid thereof, in such due and competent form as effeirs. And I consent to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation; and for that effect I constitute my procurators, &c. In witness whereof, &c. (Signed) DRUMMOND KINNOULL.—R. A Yates, *witness*; Thomas Neatham, *witness*.

No. V.

EXTRACT LICENSE AND TESTIMONIALS IN FAVOUR OF MR ROBERT
YOUNG, PREACHER OF THE GOSPEL.

At Dundee the twenty-fourth day of October one thousand eight hundred and thirty-four years. The which day the Presbytery of Dundee met and was constituted; the Rev. Thomas Irvine, minister at Lundie and Fowlis, moderator, the Rev. David Cannan, minister at Mains and Strathmartine, the Rev. Charles Adie, minister at Dundee, &c. being present. After prayer, the Presbytery taking into consideration, that Mr Robert Young, then a Student in Divinity, had produced to them certificates of his having completed his course of

theological study, agreeably to acts of Assembly, and also ample and satisfactory testimonials of character: That they had taken trial of Mr Young's attainments in literature, science, and theology; and being well satisfied therewith, had recorded their approbation in the minutes of Presbytery, and applied to the Provincial Synod of Angus and Mearns for leave to take him on probationary trials, which was granted: That thereafter the usual exercises had been prescribed to Mr Young, all of which he had delivered with approbation; and that after every prescribed formality had been duly observed, the Presbytery, on the 4th day of April 1827, granted license to Mr Young, to preach the everlasting Gospel, as a probationer for the holy ministry, now order an extract of this minute to be given to Mr Young, in certification of his having been duly licensed as a preacher in connection with the Church of Scotland.

And the Presbytery hereby further testify and declare, that Mr Robert Young has frequently preached within their bounds with acceptance, and that his conduct, as far as known to them, has been uniform pious, grave, and exemplary, as became a preacher of the Gospel, and one whose views are directed to the holy ministry, so that they can, and by these presents do, respectfully recommend him to the attention of any Presbytery or Christian people, where Providence may order his lot, for all due and suitable acceptance and encouragement from them.

Extracted from the records of the Presbytery of Dundee, on this and the two preceding pages, by (Signed) JAMES THOMSON,
Clk. of the Presby. of Dundee.

NO. VI.

CALL TO MR ROBERT YOUNG, PREACHER OF THE GOSPEL.

We, the Heritors, Elders, Heads of Families, and parishioners of the parish of Auchterarder, within the bounds of the Presbytery of Auchterarder, and county of Perth, taking into our consideration the present destitute state of the said parish, through the want of a Gospel ministry among us, occasioned by the death of our late pastor, the Rev. Charles Stewart, and being satisfied with the learning, abilities, and other good qualifications of you, Mr Robert Young, preacher of the Gospel, and having heard you preach to our satisfaction and edification, do hereby invite and call you, the said Mr Robert Young, to take the charge and oversight of this parish, and to come and labour among us in the work of the Gospel ministry, hereby promising to you all due respect and encouragement in the Lord. We likewise entreat the Reverend Presbytery of Auchterarder to approve and concur with this our most cordial call, and to use all proper means for making the same effectual, by your ordination and settlement among us, as soon as the steps necessary thereto will admit. In witness whereof, we subscribe these presents at the church of Auchterarder, on this the second day of December, eighteen hundred and thirty-four years.

Heritors and Elders
For the Earl of Kinnoull, *Patron.*
JA. LORIMER.

Heads of Families—Parishioners
MICHAEL TOD.
PETER CLERK.



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